

Exhibit “A”

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

James Quinn,

Plaintiff,

versus

3:16CV610

Glade M. Knight, et al.,

Defendants

Before: HONORABLE JOHN A. GIBNEY, JR.
United States District Judge

Preliminary Injunction Motion

August 26, 2016

Richmond, Virginia

GILBERT F. HALASZ
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, VA 23219

APPEARANCES

Geoffrey C. Jarvis, Esq.

Robin Winchester, Esq.

Charles L. Williams, Esq.

For the plaintiff

Elizabeth F. Edwards, Esq.

Charles W. McIntyre, Esq.

for defendants Glade M. Knight, et al.

Mark D. Gately, Esq.

Andrea Trento, Esq.

Jon M. Talotta, Esq.

David Buckley, Esq.

for defendants Justin Knight, et al.

i n d e x

<u>WITNESS</u>	<u>pg</u>	<u>ln</u>
Glade Knight - direct	51	21
Glade Knight - cross	58	5
Justin Knight - direct	68	3
Justin Knight - cross	74	10
Justin Knight - redirect	90	1

1 THE COURT: All right. We opened twice.

2 THE CLERK: Case number 3:16 CV 610.

3 James Quinn versus Glade Knight and others.

4 Mr. Geoffrey C Jarvis, Jr., Ms Robin Winchester,

5 Mr. Charles L. Williams represent the plaintiff.

6 Ms Elizabeth F. Edwards, Mr. Charles W. McIntyre, Mr.

7 Mark D. Gately, Mr. Andrea Trento, Mr. John Talotta and

8 Mr. David Buckley represent the defendant.

9 Are counsel ready to proceed?

10 MR. JARVIS: We are, Your Honor.

11 MS EDWARDS: We are.

12 THE COURT: All right.

13 We are here today on plaintiffs' motion for a
14 preliminary injunction in this case.

15 And I apologize for being late, but I was
16 re-reviewing some of the documents in this case plus
17 reading my favorite case, and Ms Edwards' favorite case,
18 Willard versus Monetta Building Supply, on corporate
19 shenanigans in Bedford, Virginia.

20 All right. So before we -- I am not going to decide
21 the motion to dismiss today. But I have got -- there are
22 things I don't quite understand about this case. Maybe
23 some of Mr. Quinn's lawyers can explain them to me.

24 Is Mr. Quinn -- I don't quite know the volume of
25 stock that is out for either A Ten, which is what I call

1 Apple REIT Ten, or Apple.

2 But isn't it true that if Mr. Quinn wins this case
3 his Apple stock gets damaged?

4 Does somebody want to address that?

5 MS WINCHESTER: Happy to.

6 THE COURT: Why don't you come up to the podium.

7 MS WINCHESTER: Sure.

8 THE COURT: You are Ms Winchester. Are you a
9 Philadelphia lawyer?

10 MR. GATELY: I acknowledge.

11 THE COURT: You guys are from -- where are you from?

12 MS WINCHESTER: Our offices are located in Radnor,
13 Pennsylvania, which is about a mile down the road from
14 Villanova University.

15 THE COURT: I know where Radnor is.

16 MS WINCHESTER: A very fine law school they have
17 there.

18 THE COURT: At Villanova? Are you a graduate?

19 MS WINCHESTER: I happen to be a graduate from there,
20 Your Honor.

21 THE COURT: Well, that is good.

22 So does our Magistrate Judge, Judge Novak.

23 MS WINCHESTER: Yes.

24 THE COURT: And tell me this, ma'am.

25 Are you a Philadelphia native?

1 MS WINCHESTER: I am, Your Honor, I was born and
2 raised in Philadelphia.

3 THE COURT: Did you actually grow up in city?

4 MR. JARVIS: I did not. My parents are from south
5 Philadelphia. My family all live in south Philadelphia.
6 My parents moved to the suburbs in Delaware County, which
7 is where I was born, in Philadelphia. Raised in Delaware
8 County.

9 THE COURT: Where in the county?

10 MR. JARVIS: Ashton, Pennsylvania which is in
11 Delaware County. I attended Cardinal Harrison School, St.
12 Joe's University, and if I am lucky in a basketball game
13 rooting for the Hawks.

14 THE COURT: The Hawks. Well, the Hawks never die.

15 MS WINCHESTER: The Hawks never die.

16 My father is a graduate of St. Joe's prep, which is
17 an all -- although he voted for it to go co-ed, that was
18 voted down.

19 THE COURT: Are you disappointed about the departure
20 of Carlos Ruiz from the Phillies?

21 MS WINCHESTER: Essentially known as Chooch. I am up
22 very upset that Chooch is gone. He is the last of the
23 World Series, besides Roy Halladay, but yes, right now is
24 the the last man standing of the World Champions.

25 THE COURT: He is not exactly standing the way he

1 used to.

2 MS WINCHESTER: No, he is hitting pretty good.

3 THE COURT: Has for the past month, since the All
4 Star Game.

5 Tell me the answer to my question. Are these the
6 same Philadelphia lawyers that came down here last time?

7 MR. WILLIAMS: They are affiliated, but --

8 THE COURT: From the same firm?

9 MR. WILLIAMS: Yes, sir.

10 THE COURT: Okay. Well, good. All right. So go
11 ahead, ma'am, I'm sorry.

12 MS WINCHESTER: I'm sorry. Your Honor --

13 THE COURT: My question was, they raise the point
14 that Mr. Quinn has interests on both sides of this case.

15 So, doesn't it hurt him more to win than to lose?

16 MS WINCHESTER: Well --

17 THE COURT: Or doesn't it hurt him more to lose than
18 to win?

19 MS WINCHESTER: I would say depends on which side you
20 are on.

21 THE COURT: Okay. Well, let's take a look.

22 Mr. Quinn is on both sides. If Mr. Quinn -- Mr.
23 Quinn has a ton, by my standards, of Apple Hospitality
24 stock. And if he jacks up the price through this
25 litigation of Apple Ten, doesn't his, doesn't the value

1 per share of Apple Hospitality go down?

2 MS WINCHESTER: Not necessarily, Your Honor. The
3 value of Apple Hospitality is determined by the market, so
4 whatever the market thinks is the true value of Apple
5 Hospitality is what the value will be. At the end of the
6 day, where the damages come from? Well, he is suing
7 individuals directly. So the damages could come from the
8 individuals themselves, in which case it's not out of
9 Apple Hospitality's pocket.

10 Also, Mr. Quinn has testified that his intent is to
11 slowly sell down his shares of Apple Hospitality. So it
12 is speculative at this point to say, well, what is his
13 total share value? And, again, the cases that have
14 addressed this issue are only in the context of when an
15 individual has both direct and class claims. There are no
16 cases out there that say that an individual who happens to
17 hold stock in both a target and acquirer are in any way a
18 sufficient plaintiff. Rather, those cases say when you
19 have both direct and class claims, i.e. you are both suing
20 the company and suing on behalf of the company, that, yes,
21 could be an issue there because at the end of the day you
22 are trying to recover damages for both the company and the
23 class from the company. So when there is one pot of money
24 in which you are seeking to retain a recovery, yes, that
25 makes sense that there is a theoretical difference there.

1 Now, some courts have found that that is improper.
2 Frankly, in the State of Delaware plaintiffs regularly
3 bring class and derivative claims, and it is not, is not
4 found to be a conflict.

5 Again, I don't believe there are no cases out there
6 that say that Mr. Quinn has any economic antagonism
7 whatsoever. Rather he has shown that regardless of the
8 fact that he happens right now to own more shares of
9 Hospitality than ten, his main interest is to make sure
10 Ten has a correct value, and he is getting a fair value,
11 as well as the right of the stockholders, for those
12 shares.

13 THE COURT: Well, if he gets, Apple Hospitality gets
14 Apple Ten at a discount, doesn't he profit as a
15 shareholder of Apple Hospitality?

16 MS WINCHESTER: I think all the stockholders do, yes,
17 Your Honor.

18 THE COURT: Yes. So he is sort on both sides of the
19 fence here, isn't he?

20 MS WINCHESTER: But he is not suing on -- he is not
21 suing -- he doesn't have class claim on behalf of Apple
22 Hospitality.

23 THE COURT: I understand he doesn't have a class
24 claim on behalf of anybody, but the point of the these
25 kinds of standing issues is whether he has an interest in

1 going ahead with the case. And I am just a little puzzled
2 as to how he can go -- I mean, where his true interest is.
3 Here is the question that I would ask. If I was him, why
4 wouldn't I throw the case and lose it so that my Apple
5 Hospitality shares, of which I own many more, increase in
6 value?

7 MS WINCHESTER: I guess I would ask, why is he
8 bringing the case to begin with?

9 THE COURT: Okay.

10 I will tell you why he brought it to begin with.
11 There are lot of reasons he could bring the case to begin
12 with. One of them might be to help the lawyers make a lot
13 of money, which seems to me to be one of the main
14 impetuses in shareholder litigation.

15 But, let's forget about why he brought the case to
16 begin with --

17 MS WINCHESTER: But, Your Honor --

18 THE COURT: -- ma'am, when I talk, you listen. And I
19 will try to do the same. Okay?

20 MS WINCHESTER: Yes.

21 THE COURT: Whatever his motives are, isn't -- I
22 mean, eventually he will scratch his head and say, gee, I
23 could make more money if I lose this case.

24 MS WINCHESTER: Well, Your Honor, I think what he
25 testified in his deposition was that when he saw the

1 transaction disclose, when he received the proxy, he was
2 concerned about the value for his Apple Ten shares is all
3 he was concerned about at the time. He contacted his
4 financial adviser, spoke with his financial adviser, was
5 doing and investigation on line, and contacted our law
6 firm. And after speaking with our law firm he directly
7 contacted us. We did not contact him.

8 THE COURT: I didn't suggest you did.

9 MS WINCHESTER: And he called to ask for advice as to
10 what his possible remedies would be. As a result of that,
11 he determined that he wanted to be a plaintiff in this
12 case. And I think that he has done over and above what
13 most plaintiffs do, and has shown his commitment to this
14 case in all that he has has done thus far. He certainly
15 understands what the claims are about. He was here for a
16 mediation. He was -- certainly he he gets a little
17 confused, as most people who are not lawyers and not
18 dealing with legal jargon every day, he may get confused a
19 little bit about the technical terms. But I think he has
20 also shown his level of commitment and determination to
21 make sure that the defendants don't breach their fiduciary
22 duty.

23 As we stated in our papers, that whether or not he is
24 a shareholder of Ten or Hospitality, when you have the
25 same individuals who are on both sides, whether it's

1 Hospitality or Apple Ten, you have the same fiduciary that
2 he wants to insure that those fiduciaries stand by their
3 duties. So he benefits whether he is an Apple Ten
4 shareholder or an Apple Hospitality shareholder to make
5 sure the board and management fulfill their fiduciary
6 duties to the shareholders of either company.

7 THE COURT: But I think his interests in the abstract
8 proposition of enforcing fiduciary responsibilities
9 doesn't quite cut the mustard in terms of standing. I
10 think he has got to have a more tangible interest to go
11 ahead with the suit.

12 But we are not going to rule on that today. So that
13 is something we will address.

14 All right.

15 MS WINCHESTER: I appreciate it, Your Honor.

16 THE COURT: All right.

17 So we are here today on plaintiffs' motion for a
18 preliminary injunction against the voting of the A Ten
19 shares to determine whether they -- whether a merger
20 should go forward or not.

21 Do you all -- does the plaintiff have any witnesses
22 or anything today?

23 MR. JARVIS: We do not.

24 THE COURT: And the defendants?

25 MS EDWARDS: Yes, we do, Your Honor.

1 THE COURT: All right.

2 Who do you have as a witness today?

3 MS EDWARDS: We have the chairman of the special
4 committee, Dr. Colton, by deposition.

5 THE COURT: Okay. I mean, other than things already
6 in the record.

7 MS EDWARDS: We also Mr. Glade Knight and Mr. Justin
8 Knight here prepared to testify.

9 THE COURT: Are they going to testify? That is a
10 decision you need to make now, because we are going to
11 hear the evidence before we hear the argument.

12 MS EDWARDS: Then our decision would be yes.

13 THE COURT: All right.

14 Well, call your witnesses.

15 MR. McINTYRE: We will start with the deposition.

16 THE COURT: I will tell you what. The depositions
17 are attached to the documents that have been submitted,
18 right?

19 MS EDWARDS: They are, but we put together a short
20 clip of his testimony, which is what you suggested we do
21 when we asked to move the hearing to accommodate his being
22 here to testify live.

23 THE COURT: Before we do that, let's hear a brief
24 opening from each side. Let's start with the plaintiff
25 here, Mr. Quinn.

1 Are there class A shares, class A and B shares to the
2 A Ten?

3 MR. JARVIS: Yes, there are, Your Honor.

4 THE COURT: And the A shares, those are like what I
5 would think of as regular shares of stock --

6 MS WINCHESTER: Yes.

7 THE COURT: -- I might have in Verizon.

8 MR. JARVIS: Sold to the general public. And
9 Mr. Quinn bought them.

10 THE COURT: Mr. Quinn's shares are A shares?

11 MR. JARVIS: They are A shares, Your Honor.

12 THE COURT: And he has had those for about five or
13 six years; is that right?

14 MR. JARVIS: I think that is right, Your Honor. He
15 got them --

16 THE COURT: Has the company had dividends during that
17 time?

18 MR. JARVIS: I believe so, Your Honor, approximately,
19 I believe, over the past five years, \$4.72 I think is the
20 number.

21 THE COURT: Four dollars per an-num?

22 MR. JARVIS: The total, I think it runs to a return,
23 I did the math, about eight percent. Something like that.

24 THE COURT: Eight percent return.

25 MR. JARVIS: Something like that.

1 THE COURT: Per year?

2 MR. JARVIS: Per year.

3 THE COURT: Okay.

4 MR. JARVIS: Then the B shares were Glade Knight and
5 more akin to options, you know. He has a right to convert
6 to A. They were actual shares, but they sort of look like
7 options a little bit.

8 THE COURT: A little like options, except you don't
9 have to pay money to get them.

10 MR. JARVIS: Well, they pay ten cents a share.

11 THE COURT: Well, you are not paying money now.

12 MR. JARVIS: Yes, and you didn't have to pay much
13 then.

14 THE COURT: How many shares are there in A Ten?

15 MR. JARVIS: Your Honor, I am not totally sure.

16 MS EDWARDS: In Mr. Justin Knight's declaration there
17 are 87,558,918 shares issued and entitled to vote on the
18 merger.

19 THE COURT: 87 million class A shares.

20 MS EDWARDS: This includes the conversion of the Bs,
21 right?

22 MR. BUCKLEY: Yes.

23 MS EDWARDS: 87 million.

24 THE COURT: 86 million minus the class B.

25 MS EDWARDS: I am sorry, I was wrong, Your Honor, it

1 doesn't include B. Just the A.

2 THE WITNESS: 87 million class As. And then there is
3 how many class Bs? 480,000? All right.

4 Go ahead. I'm sorry. I asked you to do an opening,
5 and then I jumped in. Go ahead.

6 MR. JARVIS: That is quite all right, Your Honor.

7 I am not sure how much of an opening you want. I
8 sure had -- I saw it more as oral argument. I didn't know
9 we were going to call live witnesses until a few seconds
10 ago. But let me give you an overview of where we are
11 going to go with this thing when we get down to argument
12 more in general.

13 You know, if it please The Court, Geoff Jarvis with
14 with Kessler Topaz, Ms Winchester. Mr. Williams is our
15 local and been assisting us in this matter. And we are
16 here, obviously, for Mr. Quinn and on behalf of the
17 company in this derivative action. We are -- I am here to
18 argue for you to enjoin the vote for two reasons. One,
19 because of the process problems we identified in our
20 brief, and I will briefly go over in the opening.

21 COURT REPORTER: Mr. Jarvis, could you speak about
22 half as fast?

23 MR. JARVIS: I'm sorry?

24 COURT REPORTER: Could you slow up?

25 MR. JARVIS: Sure. I apologize.

1 THE COURT: You are in the south now.

2 MR. JARVIS: I have been the south at various points
3 in my life, but too many years up north I think.

4 THE COURT: Well, okay.

5 MR. JARVIS: In any event. Let me try to slow down
6 and I will try to be loud, too.

7 My hearing is terrible, so I understand --

8 THE COURT: Mine is, too. I have got two hearing
9 aids that I changed batteries this morning just for you.

10 MR. JARVIS: My problem is worse. They say pride
11 goes before a fall. I don't have mine in. But in any
12 event. We are here really two claims, right? It is
13 clear, Your Honor knows this. There are fiduciary duties
14 from management and the directors of the of the company to
15 the shareholders. Under those duties they have this, you
16 know, they have to act in utmost good faith, you know, no
17 clashes of interest. Yes, there is a business judgment
18 statute here in Virginia stricter than many other places
19 but that doesn't immunize the directors from all actions.
20 It says, you know, requires them to act in accordance with
21 good faith business judgment to the best interests of the
22 corporation.

23 And there is two cases that I know Your Honor and Ms
24 Edwards have clashed over in the past, the Tyson case and
25 the Willard case.

1 I will go first to the Tyson case. I think it was a
2 fact that --

3 THE COURT: W.L.R. v. Tyson.

4 MR. JARVIS: W.L.R. v. Tyson.

5 THE COURT: Which unfortunately I referred to the
6 last time we were here as W.T.F. v. Tyson.

7 That was an error, and thank God it didn't go to the
8 Fourth Circuit.

9 MR. JARVIS: I have trouble with initials, I know,
10 and I am sticking with "Tyson." I have eaten enough
11 chicken over the years and it is kind of easier to go
12 with.

13 You know, Tyson was the case, a process case, Ms
14 Edwards was relying on before, but look at the language
15 they quote from their brief, which is at Tyson, is, you
16 know, 65 F (unintelligible) -- The Court will look at
17 advisers, consulted by the directors, their
18 qualifications, how they were selected, the general topics
19 on which they advise, whether the advice was followed.

20 And then after that comes Willard. I know Your Honor
21 took the position that it is unclear exactly what you are
22 looking at in Willard, but you look at more than just the
23 raw profit, you know. Did they go to a meeting? Without
24 going to what they said. You have to look a little beyond
25 that. And I think that is implicit in the W. L. R. v

1 Tyson. In other words, how can you tell whether they
2 followed the advice unless you have a really good idea,
3 not in just some over-arching sense, but what were these
4 guys told, and did they do it, or did they do something
5 else for some other reason? And the case we are going to
6 present to Your Honor on process falls exactly in that
7 area. We say, look at the process. I mean, they are
8 going to point there. Committee, they are going to say,
9 we do all those process things, but we are going to take
10 you through it, and we are going to say every point in
11 time where the Citibank, the adviser, made a
12 recommendation, or at least presented an option as a
13 favored option without necessarily recommending, but
14 steering the special committee, they ignored the Citibank,
15 and they went with what Hospitality wanted. I will give
16 you a brief overview. We sort of have three or four
17 areas.

18 I mean there are conflicts, I mean, it is undeniable,
19 right? Mr. Knight is on both boards. His son, Mr. Justin
20 Knight, is on both boards. The management is all the
21 same. There is clear conflict, and they know that. Your
22 Honor previously denied a motion to dismiss, frankly, for
23 the existence --

24 THE COURT: Slow down.

25 MR. JARVIS: Previously denied a motion to exist

1 because of the existence of those conflicts.

2 They tried to fix it, I will grant you. They came up
3 with a special committee and said, ah ha, we are going to
4 deal with the problems Your Honor somewhat identified in
5 the prior case, and we are going to do this special
6 committee.

7 But they picked Dr. Colton to head. And the problem
8 with Dr. Colton -- and m I am sure he is a very nice
9 man -- but he has a heck of a lot of connections with
10 Mr. Glade Knight. They have known each other by
11 Mr. Colton's admission since the early '90s. I think
12 Mr. Knight testified since the early '70s. They see each
13 other socially, putting aside their board
14 responsibilities, two or three times a year. And in just
15 the last, I don't know, 12, 13, 14 years Mr. Glade Knight
16 has appointed Mr. Colton to seven different boards of
17 directors, a university, and then six entities controlled
18 by Mr. Knight, all of which have substantial fees. And
19 Mr. Colton being retired -- and we can develop this for
20 record -- expedited -- but not even for -- seven different
21 boards, who were, you know, the last ten, mostly over the
22 last ten years -- seven different -- six of those boards
23 over the last ten years.

24 THE COURT: But, you know, in your brief you say that
25 Mr. Knight started Southern Virginia University and put

1 Mr. Colton on the board there. That is not exactly true,
2 is it?

3 MR. JARVIS: I understood --

4 THE COURT: My understanding is Virginia University
5 existed for a long time as a place called Southern
6 Seminary, right?

7 MR. JARVIS: I will be honest with Your Honor, I will
8 take your word for it. I am not familiar with that fact.

9 THE COURT: You can ask Mr. Williams. I am sure that
10 he drove down there from time to time in his undergraduate
11 days. It was known as Southern Sem to people of
12 Mr. Williams' ilk. And I am sure that -- I mean, it
13 existed. He may have helped to revitalize it, but does he
14 get as the chairman of the board of trustees did he get to
15 appoint members to the board?

16 MR. JARVIS: Well, my understanding -- Mr. Colton's
17 testimony was a tad unsure on this -- not unsure, a little
18 unclear -- he said first that he was, basically Mr. Knight
19 asked to be on the board, and then he said, well, actually
20 it was another member of the board who specifically asked
21 him, but I got the strong sense from his testimony that it
22 was in connection with Mr. Knight during the '90s that had
23 led to his being appointed to the board. But I actually
24 consider that first, to be far, that is the university,
25 you know, it is something that socially (unintelligible)

1 obviously it is important to be on the board, but less
2 significant, I think that board, you know, social good, I
3 don't know how much you get paid to be on board of
4 trustees of a university -- if I was on one I wouldn't
5 care to get paid, I would just be happy to be on the board
6 of trustees, to be perfectly honest.

7 THE COURT: You know, Buena Vista is the home of
8 Charles Manuel.

9 MR. JARVIS: Chuck Manuel.

10 THE COURT: Charlie Manuel.

11 MR. JARVIS: Charlie. Chuck, they actually call him
12 in the club. I am a big Phillies fan, too.

13 THE COURT: Are you? These are tough days.

14 MR. JARVIS: Very tough days. Actually, I mean, you
15 asked about Chooch. I was actually sort of happy to see
16 him go.

17 THE COURT: He gets to be on --

18 MR. JARVIS: Dodgers, he gets another play off run,
19 you know, he wasn't on the team next year anyway. So, you
20 know, he has been a great name for us the last decade.
21 pretty much (unintelligible).

22 THE COURT: I'm sorry. Go ahead.

23 MR. JARVIS: That is all right.

24 So, I don't think -- I think it is there, it is
25 certainly the beginning of the connection early 2000. But

1 then there is Cornerstone, Glade Knight Company. And then
2 there is Apple 5, Apple 7, Apple 8, Apple Hospitality, the
3 very acquirer here. Mr. Colton only got off the board end
4 of '14. Eight months later Hospitality is coming after
5 the company where he was head of the special committee.
6 And then Ten. All of those, Mr. Colton testified he is
7 retired. I don't know what his financial situation is,
8 but sooner or not (unintelligible).

9 THE COURT: Slow down when you talk.

10 MR. JARVIS: My point to you is not that Mr. Colton
11 is a bad guy, and that he was just sitting there looking
12 out for Mr. Glade Knight. I mean, clearly there is some
13 reason for him to want to favor Glade Knight's interest.
14 He is a friend, has all of these economic interests -- and
15 mind you, the case that we cited in our reply brief, which
16 is a more recent case from the Delaware Supreme Court,
17 suggests those kind of holistic, you look at everything,
18 look at personal relationships, look at economic
19 relationships, are sufficient in fact. That is a Delaware
20 County Retirement case versus Sanchez, Supreme Court of
21 Delaware from --

22 THE COURT: That case, though, was on a motion to
23 dismiss, wasn't it?

24 MR. JARVIS: Yes, it was.

25 THE COURT: So here we have got a different

1 procedural posture, at least at this stage, looking at a
2 broader record than just a motion to dismiss.

3 MR. JARVIS: You are. But the key point that the
4 Chief Justice was trying to make there is, you can't just
5 parse each little thing and say well, that is not enough,
6 that is not enough, you have to look at sort of all the
7 evidence, and the reason to believe that this particular
8 director is going to -- whether consciously or
9 unconsciously -- favor the interests of someone on the
10 acquiring side versus someone on the company where he was
11 a director. I think there is enough here to suggest that
12 might be the case.

13 So what does that suggest to us? Well, then let's
14 look at what happened. I will go briefly. I have more
15 (unintelligible).

16 THE COURT: That is not just Mr. Colton. There are
17 other members of that committee.

18 MR. JARVIS: Mr. Colton was the chairman. And that
19 suggests, I think he testified he had the ability to lead,
20 not in a decisional sense, but to lead. He led the
21 process. He was the primary point of contact. Looking
22 through the record Mr. Colton was the most involved. Not
23 to say Mr. Hall and Adams weren't, they were, but
24 Mr. Colton led.

25 But, it is the what happened. Where did they go?

1 What was the process? Did they follow the advisers? Let
2 me just give you a couple of quick ones. And we will go
3 through, and I -- and I will cite for for the record more
4 later, I don't do that now, I will give you an overview.

5 So on the -- first thing he did was, what are we
6 going to do here? We are dealing Hospitality, or are we
7 going to do a broader market check? Citibank has put
8 aside, said, hey, do a broad pre check, that is the most
9 investor friendly thing. And I will cite you to that. At
10 some point in like around February 11 they got an offer
11 from Hospitality. Mr. Jones, deposed, said, your know, we
12 told that offer was insufficient, and we were going to --

13 THE COURT: That is not what he said.

14 MR. JARVIS: Actually, he did.

15 THE COURT: No, that is not what he said.

16 Mr. Young said something a little more ambiguous than
17 that.

18 MR. JARVIS: 110 and 111, I believe he used the word
19 "insufficient," because I typed that yesterday my own
20 self. Let me get you the exact quote. I won't try to
21 mislead you at all.

22 Look at plaintiff's Exhibit 3 of Mr. Young's
23 deposition. Look at pages 110 and 111.

24 He says -- I am looking page 110 line 18.

25 Question: "What kind of verbal guidance did you

1 provide to Wells Fargo in connection with the economics
2 after the February 11 audit?"

3 Line 21.

4 Answer: "That it was insufficient, and that the
5 special committee is looking for more value."

6 And then he went and says, "Whoever suggests that the
7 offer was not increased, the special committee would
8 consider other alternatives, such as a market check or
9 option."

10 Answer: Now I am on page 111. "I do recall that we
11 had a general discussion with Wells Fargo special
12 committee also evaluated doing broader market checks.
13 Also established specifically after the February 11 --

14 THE COURT: Slow down.

15 You need to slow down, sir.

16 MR. JARVIS: I apologize. I get wound up.

17 THE COURT: We are trying to take this down here to
18 make a record for the National Archives.

19 MR. JARVIS: Right.

20 Starting at 110, line 24.

21 "Was there ever a suggestion that the offer was not
22 increased, that the special committee would consider other
23 alternatives, such as market check or options?"

24 Answer: Line three. "I do recall that we had a
25 general discussion with Wells Fargo that the special

1 committee is also evaluating doing a broader market check.
2 I don't know if that was specifically after the February
3 11 letter or prior.

4 And what was Wells response to that?"

5 Answer: Line eleven on page 111. "That it was not
6 Hospitality's desire to participate in any broader market
7 check."

8 THE COURT: Well, okay. But then he was asked
9 whether the offer from Hospitality was necessarily
10 insufficient. And he said, could we get more from
11 somebody else? He says, maybe, but who knows? Of course
12 that was one of the reasons you put it for a pre-bid. But
13 what is the difference between putting it out for a
14 pre-bid and a post bid? I mean, presumably if the company
15 has got some value, it has the same value afterwards it
16 had before. Right?

17 MR. JARVIS: Well, there is a lot of evidence out
18 there in the world. I can go into it in detail right now
19 if Your Honor wants to hear it now or later as to the
20 benefits of a pre market check versus a go shop.
21 (unintelligible).

22 THE COURT: Don't go into all the evidence in the
23 world, now. We save that for later.

24 MR. JARVIS: So, we want to, our first point is,
25 that, look, they had a chance to do it, they even

1 suggested pre market check. (unintelligible) Hospitality
2 says no, no, check. Perhaps -- that, you know, that
3 February 11 order I just, offer, I just referred, to was
4 insufficient. Mr. Young's language. But it had a big
5 problem.

6 THE COURT: You need to slow down.

7 MR. JARVIS: One really big mess. That one really
8 big mess was all stock. And all stock implicates
9 something called a roll up (unintelligible), which again I
10 will go into it in far more more detail later -- but
11 (unintelligible) position was very valuable potentially to
12 shareholders. Incorporated in the bylaws, not Mr. Knight
13 or his lawyers, requirement basically imposed by Virginia,
14 by Virginia, I believe. It is a model provision adopted
15 by an outfit called NYSSA, or, rather, I'm sorry, NASSA.

16 THE COURT: What does it allow them to do?

17 MR. JARVIS: What?

18 THE COURT: What does it allow them to do?

19 MR. JARVIS: The broad provision requires that, you
20 know, what is called a roll up, in other words, you take
21 an untraded REIT and bringing it up. You have to, A, have
22 to, mandatory, have it appraised. After the appraisal
23 takes place then the roll up, the person sponsoring the
24 roll up, has to offer two options, the second of which has
25 two prongs. One, you have to say, okay, you have seen the

1 appraisal, you can still take the stock we gave you. B,
2 if you don't want to take the stock we gave you, then we
3 have to offer you one of two alternatives; either, A, the
4 cash, your pro rata value of the appraisal; or keep your
5 shares. And that second option is at the roll up
6 offerer's discretion. So they don't -- they can either
7 say, take cash or take -- keep your shares. It is not the
8 shareholders' discretion. It's the roll up offerer's
9 discretion. It is a little unclear when you read the
10 bylaws, to be honest with you, but I went back to the
11 actual underlying proposal from which it is closely taken,
12 and in a footnote that makes clear that it is a roll up
13 offerer's option on whether it is cash or keep your
14 shares.

15 And that is really valuable, right? It is really
16 what Mr. Quinn, who we talked about at the opposite, was
17 asking for -- he said -- repeated in his deposition. I
18 want independent value. I want someone to tell me it is
19 not -- to get paid for getting the deal done, what this
20 thing is worth.

21 And in this particular instance, the initial offer
22 the 11th, would have done. Somewhere along the way
23 somebody told, hey, Hospitality, hey guys, remember the
24 roll up provision, you keep all cash or all stock -- just
25 the way their provision is drafted -- then, you know, you

1 are stuck with this provision.

2 So they come back on March 4 with a revised offer,
3 but nothing to intervene, no intervening counter, they
4 change their offer to one that had 91 percent stock to
5 nine percent cash. And Mr. Young asked them, hey, why are
6 you changing your offer? They told them, we don't want
7 the roll up provision.

8 THE COURT: Okay. I understand that point. Let's --
9 this is a brief opening.

10 MR. JARVIS: What?

11 THE COURT: This is a brief opening, so just what is
12 your next point beyond the roll up?

13 MR. JARVIS: So that (unintelligible) open. As you
14 know, you as you know from our briefing, in our view they
15 gave it away, (unintelligible) enforce its value, they
16 just said, okay, fine, we will respond.

17 What is the next thing that happened? Well, the next
18 thing that happens is we finally get to a price. And, you
19 know, there is a first real offer would be the 11th. The
20 next offer is March 4th. Minutes of board, say, hey,
21 there is really no difference, there is no economic
22 difference between the 11th and the 4th.

23 Then their final, that is final is on the 18th, which
24 was -- the fourth, the fourth was one dollar plus point
25 501 shares. They come back finally on the 18th, their

1 best and final, one dollar plus point (unintelligible).

2 And ultimately, as I am sure Your Honor is aware, the deal
3 was struck for two thousandths of a share at point 522.

4 So what did they really get? What did the
5 negotiations get them? The only difference between what
6 they offered on the 11th, which was really their first
7 real offer, and what they paid, two percent. They paid --
8 the whole negotiation got two percent. So what did they
9 really get? Nothing. They paid off at value price.

10 THE COURT: They got two percent.

11 MR. JARVIS: No, two percent is effectively de
12 minimis. It is effectively Hospitality's price. So what
13 do we say about the process? The structure of the
14 negotiation, single bidder, Hospitality wanted, that is
15 what happened. They structured a deal. Stock and cash.
16 Hospitality wanted that to happen. The price that was
17 paid, essentially Hospitality ruled the price, a little
18 bump, two percent, that is not nothing, I grant you, but
19 not a lot either. Two percent. They paid Hospitality's
20 price.

21 What will they tell you they got? They got the deal
22 protection. We got the go shop. I will go into more
23 detail -- I think there is a lot of evidence out there, if
24 you look and see, from some of the Dell opinion, which I
25 will go through with Your Honor a little bit. Not the

1 language --

2 THE COURT: This is your opening. You don't have
3 to --

4 MR. JARVIS: You know, so we will go through it
5 later.

6 But the go shop isn't worth very much, particularly
7 given the way the merger structured, we have something
8 called matching rights. In the contract, we have what
9 they call matching rights, which means that if somebody
10 comes in to go shop and with a superior bid, they would
11 have be required to negotiate more with Hospitality,
12 match. We are matching rights. Go shop, no one is
13 going -- when you know there are matching rights no one is
14 going to bother, because they know they will get matched
15 if they have a fair offer.

16 So the process simply didn't get anything but what
17 Hospitality wanted from a conflicted committee. And then
18 from there we go to, and given that process, which, okay,
19 even Your Honor would say, I see your problem, but it is
20 not enough for me. I say, great.

21 But let's look at the disclosure. Given the process
22 it is tainted. Clearly tainted. Even you say it is not,
23 I think it is bad enough, but that is Your Honor's call.
24 Then you need disclosures, the need for disclosures was
25 never greater. And we will go through in some gory detail

1 more, maybe not, but here the disclosure just didn't give
2 enough.

3 Now, they want to say, yes, but you don't have to,
4 you really just want them to be able to conduct their own
5 independent evaluation. Not -- no, we don't want to be
6 able to conduct, you know -- those shares, most of these
7 shareholders can't do that. But they have to be able to
8 see enough -- there are things -- and we will go through
9 it -- that any shareholder could or would understand, or
10 might understand, that would provide them the ability to
11 judge whether Citi's opinion is something they can rely
12 on. You remember right now the untraded REIT is the
13 parent and the only indicia this is a reasonable value --

14 THE COURT: It not exactly a parent.

15 MR. JARVIS: Well, a related entity, right. It is
16 not a parent. Not a parent. Related.

17 THE COURT: It is a related entity.

18 MR. JARVIS: Related. People who know this business
19 better than anyone. And the only indicia that might be a
20 fair price is the Citi opinion. And the Citi opinion is
21 provided in pretty broad terms. There are a few things,
22 they say, oh, my God, it is 140 pages, 141, but how much
23 more do you want? Probably only about two pages of stuff
24 that would provide people the ability to provide
25 additional judgment. For that reason alone we think that

1 this joint deal, should be void for disclosure, if nothing
2 else.

3 Obviously we will talk later about irreparable harm.

4 THE COURT: So we have got conflict, we have got
5 inadequacy of disclosure. Are there any other factual
6 matters that you want to allude to in your opening that
7 would go to the validity of the deal?

8 MR. JARVIS: Ah, yeah, well, you know, the test is
9 obviously so far, success on the merits. We have to show
10 irreparable harm. We think clearly disclosures do that.
11 We don't think they really address that. Their primary
12 counter point is, yeah, but the balance of the harms are
13 going to be that, you know, Hospitality could walk.
14 Mr. Justin Knight says in his declaration that Hospitality
15 might walk.

16 THE COURT: Well, they might walk.

17 MR. JARVIS: I want to argue that a little bit, too,
18 because I think that the declaration he put in can be,
19 maybe again he can do it on the stand, we will see, can
20 be, you know, quibbled with, if you will. That would
21 really be what they would do. Also, Mr. Young's comments,
22 albeit elicited from me, by me, you know, that is taking
23 their desire to walk with a grain of salt. What he
24 informed us. I think also informs the discussion. So we
25 are going to suggest that the real harm is the idea

1 Hospitality might walk if Your Honor enjoins or requires
2 more disclosure is not something that is truly likely in
3 this world.

4 THE COURT: All right.

5 MR. JARVIS: That is all I have got.

6 THE COURT: All right.

7 Thank you very much.

8 Let's hear a brief opening on behalf of Glade Knight,
9 Mr. Colton -- or is the Dr. Colton? -- Hall, Adams,
10 Keating and Apple Ten.

11 MS EDWARDS: Thank you, Your Honor.

12 As you recognized, you and I have quibbled about the
13 Willard case, but I am a champion of Willard today. I
14 think we are not talking about discovery today. We are
15 talking about what the law of Virginia is with how you
16 measure a director's fiduciary obligation and their
17 discharge of those obligations. And Willard is the road
18 map that gets us right into 13.1-690, which is where we
19 belong, because, very significantly, the only claim in
20 this case is the breach of fiduciary duty claim.

21 We are not hear under section 14(a) claims. We don't
22 need to quibble about what the Federal Securities laws
23 require in a proxy. Plaintiffs have not chosen to make
24 that claim.

25 THE COURT: Well, I understand, but they are allowed

1 to say, I think, that the disclosures were inadequate at
2 some level. I mean you couldn't lie in the disclosures.

3 MS EDWARDS: Absolutely, Your Honor, but what
4 disclosures were required under Virginia law is dictated
5 by the Virginia code, not by the Federal Securities law.
6 There is a much broader --

7 THE COURT: Also some, I mean, fiduciary aspects of
8 things also play into the nature of the disclosures
9 because, you know, a fiduciary has an obligation to be
10 honest and open with people for whom he or she is a
11 fiduciary. But I agree with you that Willard is a big
12 problem for the plaintiff in this case because essentially
13 Willard says you can give the company away to your son for
14 a lot less than somebody else is offering, and we are not
15 going to look behind that to see whether there is more
16 money available. That is the holding of Willard, isn't
17 it?

18 MS EDWARDS: Well, Willard, the holding in Willard is
19 that Virginia is not a Revlon state. You don't have to
20 get the best price. Absolutely, Your Honor. And we are
21 not talking about that. Although, Mr. Quinn in his
22 deposition, that is his motivation. He wants -- he
23 doesn't think that the price is necessarily fair, he said.
24 And he wants a third party to appraise it, which is
25 exactly where he can get with his statutory appraisal

1 rights, which he will have. But, that is an issue that
2 will --

3 THE COURT: An issue that goes to irreparable --
4 well, it doesn't go to irreparable harm, because at the
5 end if the sale goes ahead, or if the merger goes ahead --
6 and based on the information you have provided me it looks
7 like it will fly through pretty easily -- then there won't
8 be any A Ten any more. And I think that that is sort of
9 the quintessential to irreparable harm, the absence of
10 existence.

11 MS EDWARDS: Well, Your Honor, absolutely. If the
12 merger goes through the Apple Ten shareholders will cease
13 to be Apple Ten shareholders. They will get their dollar
14 in cash, plus point 522 shares in Apple Hospitality. That
15 will give them the ability, because Apple Hospitality is
16 publicly traded, to, you know, have liquidity to get their
17 money in or out of the investment when they want.

18 But not to belabor, because this is a short opening,
19 an injunction is a very serious and significant remedy.
20 And it will have significant consequences here for all of
21 the Apple Ten shareholders.

22 THE COURT: They have got to show a strong likelihood
23 of success on the merits, and that is where Willard versus
24 Monetta is a problem for them.

25 MS EDWARDS: That's absolutely right, Your Honor.

1 I can quibble with a lot of what Mr. Jarvis just
2 said. I think the potential conflict that he raises is
3 not present. They rely heavily on the Sanchez case out of
4 Delaware. I would suggest to Your Honor that case is
5 decidedly different than the facts in this case.

6 In the Sanchez case the director at issue who was
7 allegedly conflicted was employed, as was his brother, by
8 a company that was controlled by the interested party.
9 There is no allegation here that Mr. Colton in any way,
10 shape or form, has that sort of financial tie to
11 Mr. Knight or anyone in the management of the Apple REIT
12 company.

13 Mr. Colton, as you will see when we play his
14 deposition, is a man of integrity, he is trying to do the
15 right thing for the Apple Ten shareholders. The fact that
16 he has in the past served on other boards of other Apple
17 companies makes him knowledgeable about the REIT industry,
18 but it doesn't create a conflict. Knowledge isn't
19 conflict.

20 He is independent. He believes himself to be
21 independent. And if he were not, Your Honor correctly
22 points out there are two additional members of the special
23 committee. The testimony is crystal clear that the
24 special committee acted unanimously, and that Mr. Colton
25 did not strong-arm the special committee or dictate its

1 actions.

2 This is a process that is exemplary. The special
3 committee was independent. They engaged in a fulsome
4 process.

5 THE COURT: Fulsome.

6 MS EDWARDS: Absolutely, Your Honor.

7 THE COURT: That is not a word you hear very often.

8 MS EDWARDS: They had 31 minuet-ed special committee
9 meetings between the first letter from Apple Hospitality
10 and the time the merger agreement was signed.

11 THE COURT: But nevertheless, they filed a knee-jerk
12 suit.

13 MS EDWARDS: They didn't file a knee-jerk suit. The
14 plaintiff did.

15 THE COURT: That is what I said. "They" being the
16 other side.

17 MS EDWARDS: Absolutely, Your Honor.

18 THE COURT: And your use of adjectives is wonderful.

19 MS EDWARDS: Thank you, Your Honor.

20 THE COURT: But not terribly persuasive. Adjectives
21 don't carry the day, the facts do. But I think your use
22 of facts is good, too. I think they have just got
23 problems with Willard.

24 MS EDWARDS: I absolutely agree, Your Honor. And if
25 there are specific points you would like me to address, I

1 will be happy to do that. Otherwise, I will move on to
2 the next phase.

3 We do have a clip of Mr. Colton's deposition which we
4 are prepared to play. We also have Mr. Glade Knight and
5 Mr. Justin Knight, both of whom are here and available to
6 testify.

7 THE COURT: I will be glad to hear from them.

8 MS EDWARDS: All right. Thank you.

9 THE COURT: Now, does Justin Knight, Mr. Buckley,
10 Mr. McKenny, Mr. Peery and Apple Hospitality want to make
11 a brief opening?

12 MR. GATELY: Yes, Your Honor. I have never passed up
13 the opportunity to talk. I will try to be brief.

14 THE COURT: Who are you?

15 MR. GATELY: I am Mark Gately, Your Honor.

16 May it please The Court, I am from Baltimore. I
17 don't know if you are going to ask about the Orioles or
18 not.

19 THE COURT: No, I have nothing to say about the
20 Orioles.

21 MR. GATELY: I thank your law clerk and I thank you,
22 I was lucky enough to be a law clerk years ago, and I know
23 how much work these things are for The Court, and I
24 genuinely appreciate what it takes.

25 Your Honor, as all the lawyers say, I will try to be

1 brief; and I will try to be brief.

2 One question you had were on the number of shares.
3 You have got the Apple Ten shares. Apple Hospitality has
4 170,670,720 shares.

5 Just --

6 THE COURT: How many? 170 million, did you say?

7 MR. GATELY: Yes. 170,670,720. I think you already
8 have the Apple Ten.

9 THE COURT: Right. Okay.

10 MR. GATELY: This is obviously substantially, very
11 serious, dangerous day for the shareholder of Apple Ten.
12 I don't stay that with exaggeration. They are, to state
13 the obvious, the owners of Apple Ten. There have been
14 many votes cast already, obviously, since the deadline
15 date is the 31st, but voting can take place before that.
16 There have been votes cast on the Apple hospitality side
17 and on the Apple Ten side. And really, what is being
18 asked here --

19 THE COURT: Apple Hospitality, that has been in
20 existence how long?

21 MR. GATELY: It is the roll up of.

22 THE COURT: That is the one I had the last time, the
23 Apple --

24 MR. GATELY: I wasn't in the one last time, but I
25 think the answer is "yes."

1 THE COURT: 7, 8, and 9 became Apple Hospitality.

2 MR. GATELY: That's correct.

3 THE COURT: Not long after that case was settled, to
4 everyone's shock and surprise they had a public offering.

5 MR. GATELY: Apple Ten, public offering was,
6 actually, I think the effective date of the S-11 was
7 January of 2011. But it was in 2010 --

8 THE COURT: Right.

9 MR. GATELY: -- that it was in there.

10 No question, what we are asking The Court here for is
11 take the vote away, take the option away from the people
12 who own the company. And I don't have to tell you, Your
13 Honor has been doing this for a while, that is a pretty
14 serious request. A pretty high standard in the Fourth
15 Circuit. I show my age by saying it is the Blackwelder
16 standard.

17 THE COURT: No, it is not the Blackwelder.

18 MR. GATELY: I know it is not, but it is the factors,
19 likelihood of success, balance of harm, public interest,
20 and irreparable harm. On the irreparable harm, since you
21 asked the question, Your Honor, there is a damages action
22 here. And the plaintiffs have made it clear that they
23 intend to pursue it, and would like a lot of damages.
24 Apple Ten will not disappear after this transaction. This
25 is in the proxy statement. It will be merged into the

1 acquisition subsidiary which exists, and it will remain as
2 a wholly-owned subsidiary of Apple Hospitality, will not
3 be rolled up into our Apple Hospitality. So it will still
4 exist as a company. The difference will be it will be
5 wholly owned by Apple Hospitality if the deal goes through
6 rather than being owned by the public shareholders, who
7 will have sold their shares.

8 Some questions you asked, Your Honor, I will try to
9 answer just in the interest of time. The series B shares.
10 The series B shares were what is probably best described
11 as founder shares. They were issued to Mr. Glade Knight.
12 He paid \$40,000 for them, which now looks like a great
13 investment. At the time he also guaranteed a \$400,000
14 loan, and he was the one who initiated the public
15 offering.

16 THE COURT: But there were 87 million class A shares
17 issued, right?

18 MR. GATELY: Yes, but --

19 THE COURT: These were ten bucks a pop, is that
20 right?

21 MR. GATELY: 10.5411, Your Honor.

22 THE COURT: So other people put in \$870 million.

23 MR. GATELY: Yes, Your Honor, but the point is, when
24 he got those founder shares everyone knows Glade Knight
25 was to play an extremely important role in whether Apple

1 Ten was successful.

2 THE COURT: I think -- did Mr. Knight own any of the
3 class shares of, the class A shares of A Ten?

4 MR. GATELY: Well, he does because of the conversion.

5 THE COURT: Well, okay. Before the conversion, which
6 hasn't happened yet, since the merger hasn't happened.

7 MR. GATELY: I believe he has bought some of the
8 class A shares, and he can explain that.

9 THE COURT: You probably know the answer. How many
10 class A shares does he have?

11 MR. GATELY: I don't exactly know that answer. I
12 think he may have spent a million dollars on this, Your
13 Honor, but I am not positive of that.

14 THE COURT: How about Justin, does he have any class
15 A shares?

16 MR. GATELY: I don't know the answer to that, Your
17 Honor.

18 THE COURT: You don't know that?

19 MR. GATELY: I probably should, but I don't.

20 THE COURT: Might be a good thing to know?

21 MR. GATELY: It probably would be a good thing to
22 know.

23 THE COURT: The class A shares awarded 8 percent
24 dividend per year, is that right? That is pretty good.

25 MR. GATELY: That is high.

1 THE COURT: It is.

2 Did Apple Ten use Apple advisers as its sort of
3 management company?

4 MR. GATELY: Yes.

5 THE COURT: And that is a Mr. Knight company, too,
6 right?

7 MS EDWARDS: Yes.

8 THE COURT: How much did they pay to Apple advisers
9 over the years?

10 MR. GATELY: I don't know the exact rate, but would
11 have paid, whatever normal fees are.

12 THE COURT: Is it like, you know, ten thousand
13 dollars a year?

14 MR. GATELY: It would have been more than that.

15 THE COURT: A lot more than that, wouldn't it?

16 MR. GATELY: Yes.

17 THE COURT: How much more?

18 MR. GATELY: I don't know.

19 THE COURT: Would it have been a hundred thousand
20 dollars a year?

21 MR. GATELY: Probably would have been that or more,
22 but obviously they were getting services for that.

23 THE COURT: I understand they were getting services
24 for that. And presumably Apple advisers was making a
25 profit on that.

1 MR. GATELY: Presumably, yes.

2 THE COURT: You don't know how much they paid to
3 Apple advisers?

4 MR. GATELY: I don't know exactly, Your Honor.

5 THE COURT: Somebody know that?

6 MR. GATELY: Sure. Mr. Knight knows that.

7 THE COURT: We will find out forthwith then.

8 MR. GATELY: Yes, Your Honor.

9 I mean, those are, obviously, Your Honor, legitimate
10 questions, but to me --

11 THE COURT: What do Apple Hospitality shares trade
12 for now?

13 MR. GATELY: They don't trade. I mean, that is one
14 of the key factors here.

15 THE COURT: No, no, no. I thought Apple
16 Hospitality --

17 MR. GATELY: No, Apple Hospitality shares --

18 THE COURT: They were about 19 bucks at one point.

19 MR. GATELY: As of yesterday Apple shares were
20 trading at \$19.71, meaning that the per share value that
21 the Apple Ten shareholders would get today is \$11.29 as
22 opposed to the \$10.85 number that Citibank used. Meaning
23 that because of the share price increase of Apple
24 Hospitality the value of this deal is now 38 point
25 8 million higher than when it was announced.

1 And we heard, and as Your Honor knows, we are not a
2 Revlon state, but nevertheless we heard about post market
3 check, pre market check. Perhaps one of the most telling
4 things is in the -- it seems like you have read the Young
5 deposition -- but one of the things he said in the post
6 market check, Blackstone had actually said, did you come
7 to us earlier? But then they looked at the price -- and
8 this is on page 219 of the deposition of Mr. Young --
9 Blackstone came back and felt that this was a full offer.
10 And they, Blackstone -- used to playing in the major
11 leagues -- had to ability to bid above that level. Which
12 in addition to Citibank and Baird and Wells Fargo is very
13 telling. Particularly since Blackstone has purchased one
14 of these entities in the past. So the idea that this go
15 shop afterward was just not worth anything I think is
16 completely incorrect. I think it is very telling in terms
17 of valuing this deal to know what Blackstone said about
18 it.

19 THE COURT: You know, the problem with this case from
20 your standpoint -- may not be today -- but the plaintiffs
21 have asked for damages and damages for fiduciary
22 violations. And the whole thing -- that is going to go to
23 a jury -- and the problem with the case from your
24 standpoint is that there are too many Knights on both
25 sides of the case. And I think that jurors are going to

1 think that Mr. Glade Knight made out like a bandit on this
2 because, as I just pointed out to you, somebody else put
3 up \$870 million to get this company going. And suddenly
4 he is making \$65 million out of the deal by converting
5 essentially worthless securities into class A securities.
6 And I think people are going to scratch their head about
7 that and say, you know, I am not so sure about that. And
8 somebody may get a substantial damage award against them.

9 MR. GATELY: As one of my mentors told me, courtrooms
10 in America are dangerous places to be, so I can't disagree
11 with that, Your Honor, although, some comments are, Glade
12 Knight had absolutely nothing do with the proceedings with
13 the special committee here, A. And B --

14 THE COURT: You say that. I have trouble believing
15 that. Do you believe that?

16 MR. GATELY: Yes. I think if you hear from him you
17 may not, Your Honor, with all due respect. I have no
18 problem.

19 Also, we hear constantly that his interests were
20 different from those of the other stockholders of A Ten.
21 What could possibly be further from the truth?

22 THE COURT: What could possibly be closer to the
23 truth? His interests is he turns his ten-cent shares into
24 \$10 shares.

25 MR. GATELY: But that is my point. Whatever the

1 higher the price for the common shareholders, the more he
2 gets.

3 THE COURT: He could sell the company, even though he
4 might be better off as a non-sold company. I don't think
5 you ought to try to paint, not to me at least, that Glade
6 Knight is a saint. He may be -- I am sure he is a good
7 man. He has rescued Southern Sem from, or helped rescue
8 it from the doldrums of being a dead institution in Buena
9 Vista.

10 MR. GATELY: Yes, Your Honor.

11 THE COURT: But he did pretty well in this whole
12 thing. I think some fast-talking Philly lawyer could tell
13 some jurors that he made out like a bandit in this. I
14 don't know Glade Knight. Maybe he did, maybe he didn't.
15 And God knows he has been very successful in business, and
16 hats off to him for that.

17 MR. GATELY: But -- I understand, Your Honor. I
18 mean, I have tried enough jury cases to understand. But
19 the other side of it is Apple Ten wasn't successful by
20 accident.

21 THE COURT: Absolutely. And it was successful
22 because Mr. Knight and his son Justin applied their very
23 good managerial tools to it.

24 MR. GATELY: Exactly. That is the other side of
25 that, and were rewarded for it as were the common stock

1 stockholders on the irreparable harm. We have already
2 mentioned that.

3 THE COURT: Let me ask you that. Are the common
4 stockholders, I mean they have gotten their eight percent
5 dividend, which is nothing to snort at.

6 MR. GATELY: Not at all.

7 THE COURT: But that has been for just a couple
8 years, right?

9 MR. GATELY: Well, they have only because they
10 haven't existed for that long, but, yes, Your Honor,
11 certainly.

12 THE COURT: Right. But, are the -- are the A Ten
13 shareholders making a profit for themselves on this sale?

14 MR. GATELY: They are now, Your Honor, with the price
15 that I told you it is now.

16 THE COURT: Getting this 19 and a half dollars a
17 share, whatever it is.

18 MR. GATELY: Well, what they will get will after you
19 convert, it is now --

20 THE COURT: Eleven bucks a share.

21 MR. GATELY: \$11.29, which is, as I said, \$38 million
22 more than what was used in the calculation at the time of
23 merger. Yes, they definitely will.

24 Another very important thing to consider is that A
25 Ten is publicly issued, but non traded. So --

1 THE COURT: Not liquid.

2 MR. WILLIAMS: And this gives them the liquidity.

3 They may hold it, and as we have said, the dividends were
4 great. But they can't just go out and sell it.

5 MR. GATELY: Thank you very much, Your Honor.

6 I appreciate it. I had to talk about the Orioles,
7 but it sounds like you Phillies fan.

8 THE WITNESS: I am, and I like the league where the
9 pitchers hit.

10 MR. GATELY: I do, too.

11 THE COURT: Thank you.

12 Now, the plaintiffs do not have any witnesses to
13 offer today, so I will then hear from, I guess first we
14 will hear from A Ten and its affiliated entities or
15 individuals, which would be Glade Knight, Dr. Colton,
16 Hall, Adams and Keating.

17 Ms Edwards, do you have some evidence to offer?

18 MS EDWARDS: Yes, Your Honor. We have some portions
19 of the deposition testimony of Dr. Colton.

20 (Video of Kent W. Colton played)

21 THE COURT: Okay.

22 So far it has been a pretty good advertisements for
23 McGuireWoods. All right. Thank you.

24 Do you have other evidence you want to put on?

25 MS EDWARDS: Yes, Your Honor, we do.

1 THE COURT: Now would be the time.

2 MS EDWARDS: Then we call Mr. Glade Knight. All
3 right. I will ask you to place your left hand on the
4 bible, raise your right, and face the clerk, if you have
5 no objection to swearing on the bible.

6 THE WITNESS: I love the bible.

7 THE COURT: Well, okay, but that doesn't mean -- a
8 lot of people love the bible and for that reason don't
9 want to swear on it.

10 GLADE KNIGHT

11 WAS SWORN AND TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS EDWARDS:

14 Q Would you tell Judge Gibney about your relationship
15 with Mr. Colton and how he came to serve on the board of
16 Apple Ten?

17 A Sure. I was impressed with his testimony. His dates
18 are probably correct. I met him a long time ago.

19 THE COURT: I hope you are not too impressed with his
20 practicals. I thought he mentioned the early '90, which
21 was, according to him, 15 years ago.

22 THE WITNESS: I think we met before that.

23 We did meet at a church meeting. Our church is very
24 large. It is world wide. I don't attend meetings other
25 than some leadership meetings with him.

1 But, very impressed with him as to his professional
2 background, his work with the home builders. I was
3 impressed with his credentials education wise were very
4 impressive. I found him and continue to find him just an
5 outstanding individual.

6 THE COURT: Is he a doctor?

7 THE WITNESS: He has a PhD in economics, I think from
8 Harvard. Does a lot of, I think he still does research
9 for Harvard in their housing --

10 THE COURT: Thank you.

11 Go ahead.

12 BY MS EDWARDS:

13 Q How did he come to be on the Apple Ten board?

14 A I asked him to be on Apple Ten board. I had -- he
15 had served with me, as he indicated, at Southern Sem,
16 which -- it has a unbelievable history.

17 THE COURT: Yes, it does.

18 THE WITNESS: And we won't get into that story, but
19 it was rescued. I led that charge. Ended up being the
20 chairman of the board for 20 years at the University, and
21 it has been a remarkable experience. The State of
22 Virginia actually helped out a little bit, and sent some
23 money to it.

24 THE COURT: Do they still have an equestrian program?

25 THE WITNESS: That is a sad thing. I am a horse

1 lover. That is why I went there. I went there because I
2 enjoyed the equestrian side, had a friend that asked me to
3 go up and take a look at it, and we did. I had no idea
4 what the future would be, but it is pretty impressive.

5 THE COURT: Okay. Sorry. Go ahead.

6 MS EDWARDS: All right.

7 Q Do you have any financial ties with Mr. Colton?

8 A No.

9 THE COURT: Did you have any role in naming the team
10 of Southern Virginia University the "Knights?"

11 THE WITNESS: Sure. Sometime I would like to tell
12 you the whole story. I didn't intend to be involved with
13 the University. When we took the University over -- and
14 it lost its accreditation from SAGA and performed such a
15 wonderful, wonderful service up there. Their mascot was
16 the Fillies. And so they had little horse, all girl's
17 school at one time, and so I had this dream since we
18 became co-educational that it would be the Colts and the
19 Fillies. So, I went to a group of the students and said,
20 I have came up with a mascot. I would like to have the
21 Colts and the Fillies, and I would like to have a couple
22 little horses bronzed. And they said, the first student
23 body was only 75 kids. They said we have already met, we
24 have our mascot, and it is the "Knights." And I said, no,
25 I really don't want that. And they said, that is too bad.

1 It is the "Knights."

2 So with that, with pride when I go to the games, Go
3 Knights, it is pretty impressive.

4 THE COURT: Okay. Go ahead. I am sorry.

5 BY MS EDWARDS:

6 Q Mr. Knight, could you explain to The Court what role,
7 if any, you had in connection with the negotiations for
8 the Apple Ten Hospitality merger?

9 A Very difficult for me. I really didn't have a part
10 in that.

11 We did -- we did follow the independent rules. I
12 feel like I understand real estate and take very seriously
13 my responsibility to the shareholders. Take my
14 responsibility to Mr. Quinn very seriously. This is
15 costing shareholders money. That bothers me as to the
16 great -- to a great extent.

17 But, the role that I played in it was to remove
18 myself from the process.

19 I, obviously, knew the offers as they went out
20 publicly. And I did not vote. Did not vote in the
21 meetings. It was really a hard process for me to not be
22 involved.

23 I do support, and I think some -- just a little bit
24 of clarity -- this is not a sale. We have done ten public
25 non-traded, and then some of them came, Cornerstone was

1 traded on the New York Stock Exchange. We have done ten
2 of them. And this is, as a shareholder in Ten, they still
3 are shareholders. They get cash. They have received
4 today \$4.61 in dividends. \$11 investment. And my shares
5 and Mr. Quinn's shares go into a three and a half time
6 larger publicly traded, very successful company, very
7 large company, and they have greater diversification.
8 They don't have to sell their shares. But they can make
9 that decision on their own. It takes out of my hands the
10 responsibility of doing the sale. And we have looked
11 at -- we look at everything, that is why we sold four of
12 them separately. If we can get the highest and the best
13 price, that is what we do for our shareholders.

14 Q But in this case, Mr. Knight, did you have any role
15 in the negotiations between Apple Ten and Apple
16 Hospitality about a potential merger?

17 A No, I did not.

18 Q You have heard a lot about the B shares. Could you
19 explain to Judge Gibney very briefly sort of the nature of
20 the B shares and how you come to have them?

21 A Sure.

22 The B shares, there has been a lot of discussion
23 about the B shares. The B shares are --

24 THE COURT: Let me just ask you. Would it be fair to
25 say that Dr. Hall --

1 MS EDWARDS: Colton.

2 THE COURT: -- Dr. Colton's testimony, that they were
3 incentive for to you make the company run well accurate?

4 THE WITNESS: Yes.

5 THE COURT: Okay. Thank you.

6 MS EDWARDS: Enough about the B shares, Your Honor?

7 THE COURT: That's enough about the B shares. I
8 understand that it is, you know, it is a lot of money to
9 him, but it is a company that has done well.

10 MS EDWARDS: Yes, Your Honor.

11 BY MS EDWARDS:

12 Q There was a question about your additional purchases
13 of Apple Ten stock. Did you make additional purchases
14 other than the purchase of the B shares?

15 A Yes.

16 I purchased approximately a million dollars, the same
17 as every other shareholder. I received nice dividends for
18 those. And, again, further aligning me with the
19 shareholder.

20 THE COURT: All right.

21 MS EDWARDS: Your Honor, that is all the questions I
22 have for Mr. Knight.

23 THE COURT: Thank you very much.

24 Mr. Jarvis.

25 Wait, you have to answer questions from him.

1 MR. JARVIS: I didn't hear.

2 THE COURT: Go ahead. Ask your questions.

3 MR. JARVIS: Could I have a little scope on the
4 cross, or scope of direct?

5 THE COURT: Yes.

6 CROSS EXAMINATION

7 BY MR. JARVIS:

8 Q Okay.

9 You are shareholder of Hospitality, right?

10 A Yes.

11 Q So about five percent of Apple Hospitality?

12 A Repeat that.

13 Q I'm sorry.

14 You have about five percent of Apple Hospitality?

15 A Approximately.

16 Q So at 170 million shares you own about what, eight
17 and a half million shares?

18 A Approximately. Little less than that.

19 Q At the B share conversion you own less than one
20 percent. Do you know what percentage?

21 A Approximately five percent, yes.

22 Q What's your percent holding in Apple Hospitality
23 prior to your conversion to B shares? Point 1 percent,
24 give or take?

25 A Probably.

1 THE COURT: Whoa. Whoa.

2 You just said you own five percent of Apple

3 Hospitality, right?

4 THE WITNESS: Correct.

5 MR. JARVIS: Did I say it wrong? I think I misspoke.

6 THE COURT: You said Apple Ten; is the --

7 MR. JARVIS: I think he understood my question even

8 if I said it wrong.

9 THE COURT: Hold on. One person talks at a time,
10 otherwise, Mr. Halasz can't take it down correctly.

11 All right?

12 So, as I understand it, you own five percent of Apple
13 Hospitality, but a relatively, looks like maybe half a
14 percent of the class A shares of A Ten after the
15 conversion; is that fair to say?

16 THE WITNESS: Clarification.

17 The conversion of the B shares has been exactly the
18 same in all ten companies.

19 THE COURT: Okay. I am trying to get how much A Ten
20 you own, and the answer is, \$480,000 -- 480,000 shares; is
21 that right?

22 THE WITNESS: Correct.

23 THE COURT: And that, according to my multiplication,
24 that is about half a percent share of the class A shares
25 of A Ten. So, a relatively small owner of A Ten shares.

1 MR. JARVIS: You have got my point.

2 THE WITNESS: Correct.

3 THE COURT: Okay.

4 BY MR. JARVIS:

5 Q So, if A Hospitality buys A Ten on the cheap, you
6 make lot of money, don't you?

7 THE COURT: Well, me makes a lot of money from the
8 conversion of the shares.

9 BY MR. JARVIS:

10 Q A lot of money. Let's say you got -- I know this
11 isn't the case -- you have got it for a dollar, so all the
12 assets that came up very cheaply, now that would enhance
13 the value of your A Hostility shares, as a hypothetical,
14 correct?

15 A Yes.

16 THE COURT: Well, the same thing is true of
17 Mr. Quinn.

18 BY MR. JARVIS:

19 Q I can talk about Mr. Quinn, but you are right. I
20 understand your point, Your Honor. I heard earlier.

21 But Mr. Quinn wasn't in charge of the deal. Let's
22 talk about that.

23 You did a roll up of A, or prior to your roll up of A
24 A 7, A 8 and Apple Hospitality, you had sold the REIT, the
25 non traded public, correct, third party buyers?

1 A We sold 6 separately. We sold 5 separately. We sold
2 2 separately. To an outside buyer.

3 Q A 7, A 8, A 9 roll up was the first time you decided
4 to keep them sort of in the family under your control
5 rather than selling off to third parties to take the
6 company, correct?

7 A No. We look at all of the options. Sometimes the
8 public market is better.

9 THE COURT: The question is, the merger of A 7, A 8,
10 and A 9 was the first time you didn't sell it to somebody
11 outside the Apple family; is that correct?

12 THE WITNESS: That is not correct.

13 BY MR. JARVIS:

14 Q So which is the first one?

15 A Apple Cornerstone was the first one. And the
16 Cornerstone --

17 THE COURT: Did Cornerstone become part of Apple
18 Hospitality?

19 THE WITNESS: It was one of my companies, the same.
20 When you look at Apple Ten companies, it was one of the
21 ten public companies that had B shares, was organized,
22 formed the same way. Exactly the same way.

23 THE COURT: I think we are talking on opposite or on
24 parallel, but --

25 MR. JARVIS: Did you --

1 THE COURT: Hold on.

2 Parallel but not intersecting tracks here. Which is
3 of course what "parallel" means.

4 His question is this. When you had Apple 1 through
5 7, or 1 through 6, did any of those get sold to other
6 Apple entities?

7 THE WITNESS: No.

8 THE COURT: Did any of them get sold to other Glade
9 Knight entities?

10 THE WITNESS: No.

11 THE COURT: Is that what you are trying to get at?

12 MR. JARVIS: Yes. Thank you, Your Honor. You are
13 doing my job for me.

14 THE COURT: Okay.

15 BY MR. JARVIS:

16 Q And after you rolled A 7, A 8, A 9, into Hospitality,
17 the only remaining Apple entity was Ten that was not owned
18 by by your companies; correct?

19 A Yes.

20 Q Owned by shareholders.

21 And at any point after, during or after the roll up
22 of A 7, A 8, A 9 into Hospitality was it discussed among
23 management or the board of any of these entities, actually
24 a Ten might want to be considered as joining the family?

25 A Yes.

1 Q Mr. Colton was on the board of entities that, where
2 those discussions were held, was he not?

3 A Yes.

4 Q So Mr. Colton was aware that there was a plan
5 potentially afoot at some point prior to his leaving the
6 Apple Hospitality board at the end of 2014, he was aware
7 that there might well be an attempt down the road to take
8 A Ten?

9 A All the board members, and all management was aware
10 that that was their job from the very beginning. If we
11 could sell in the private market, if we could merge those,
12 we had by our document you could list, we could list
13 without even a vote of the shoulders. We kept all of our
14 options dependent on the shareholders. So discussions
15 were on-going about what is the market, what is the trade
16 in the market, what is the private market, where can we
17 maximize for our shareholders? That was on-going
18 discussions, not a quick, knee-jerk reaction.

19 Q Mr. Colton knew that there was a strong chance that
20 somewhere down the road that Apple Hospitality, came to be
21 known, might want to consider acquiring A Ten. That was
22 something that you knew -- you knew that, right?

23 A Well, you would have to ask Mr. Colton. I didn't ask
24 him that directly.

25 Q It was discussed at board meetings where he was

1 present, was it not?

2 A There were discussions, yes.

3 Q And you were someone who was suggesting that, were
4 you not, that we might want to acquire A Ten down the
5 road? Right?

6 A Correct.

7 THE COURT: Now, was Colton on the board of Apple
8 Hospitality?

9 THE WITNESS: Repeat that, please.

10 THE COURT: Was Colton on the board of Hospitality,
11 Apple Hospitality? He wasn't until this deal came along.

12 THE WITNESS: He was on when 7 and 8 merged. He was
13 a board member.

14 THE COURT: Okay.

15 THE WITNESS: And came in and then resigned.

16 THE COURT: But he became a member of Apple
17 Hospitality board at some point, and then he resigned
18 before this deal occurred; correct?

19 THE WITNESS: Correct.

20 THE COURT: Okay.

21 BY MR. JARVIS:

22 Q Now, Mr. Colton is retired, is he not, from his main
23 business?

24 A I think he still teaches at the University. I think
25 he still consults for them. I know nothing about his

1 business.

2 Q Mr. Colton joined, or Dr. Colton, excuse me, joined
3 the board of Cornerstone. He was paid director fees, was
4 he not?

5 A Repeat that, please.

6 Q He was paid director fees when he joined the board of
7 Cornerstone?

8 A Yes.

9 Q What do the director fees, director fees at
10 Cornerstone run, do you recall?

11 A I can't recall.

12 Q 20,000 a year, 50,000 a year?

13 A No. They are very, very small fees.

14 Q And he was also paid director fees as director of A
15 5?

16 A Correct.

17 Q And A 7? Correct. And A 8?

18 A Correct.

19 Q Hospitality?

20 A Correct.

21 Q A Ten, correct?

22 A Correct.

23 Q And as a member of the special committee he received
24 approximately \$1,500 for every special meeting the
25 committee held, isn't that the way it was actually

1 structured for the special committee?

2 A Yes. I did not establish that.

3 Q But you were aware of it, right?

4 A Yes.

5 Q They had about 30 odd meetings, correct?

6 A They had a number of meetings.

7 Q Somewhere in the neighborhood of \$50,000

8 (unintelligible) on special committee, isn't it?

9 A Yes. I think you will find that very small compared
10 to board fees that are paid.

11 THE COURT: Well, okay.

12 Just answer the question.

13 BY MR. JARVIS:

14 Q As an aside, does your biography on the A Ten website
15 describe you as a founder of Southern University, founder
16 of Virginia Southern University?

17 A I don't believe so. Oh, it is referred to as the
18 founding chairman.

19 Q Okay.

20 A Not the founder. No, no. No. When I resigned they
21 elected to call me rather than "resigned," to call me
22 forever the founding chairman.

23 Q Okay.

24 Let me just check with my colleague. See if I missed
25 anything, Your Honor.

1 THE COURT: All right.

2 MR. JARVIS: That is all, Your Honor.

3 Thank you.

4 THE COURT: Thank you very much.

5 I guess the lawyers for Mr. Knight and Mr. Buckley
6 and so forth get to ask questions of him as well, if they
7 want to.

8 They don't have any questions, do they?

9 MR. GATELY: I do not, Your Honor.

10 THE COURT: Does Ms Edwards, you don't have any
11 redirect, do you?

12 MS EDWARDS: I do not, Your Honor.

13 THE COURT: Mr. Knight, thank you very much for
14 coming today. You may step down.

15 THE WITNESS: Thank you.

16 (Witness stood aside)

17 THE COURT: Do you have any other witnesses,
18 Ms Edwards?

19 MS EDWARDS: We do, Your Honor, although Mr. Gately
20 is going to conduct that examination.

21 THE COURT: They are being called by --

22 MS EDWARDS: Apple Hospitality.

23 THE COURT: -- Apple Hospitality, is that correct?

24 MS EDWARDS: Yes, Your Honor.

25 MR. WILLIAMS: We call Justin Knight.

1 THE COURT: All right.

2 JUSTIN KNIGHT

3 WAS SWORN AND TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 THE COURT: All right. Good morning, Mr. Knight.

6 THE WITNESS: Good morning, Your Honor.

7 THE COURT: How long do you think this is going to
8 take?

9 MR. GATELY: Less than 20 minutes.

10 THE COURT: All right.

11 Let's take a break then.

12 Recess for ten minutes.

13 MR. GATELY: Thank you, Your Honor.

14 (A recess was taken)

15 THE COURT: Mr. Gately.

16 All right. Take it away, sir.

17 BY MR. GATELY:

18 Q Mr. Knight, famous last words. I will try to be
19 brief. But I really am.

20 The Court asked me during opening -- I should have
21 known and didn't -- how many shares of Apple Ten do you
22 own?

23 A Just under a thousand shares.

24 Q That is common shares?

25 A Correct.

1 Q And you own some series B, also, that were given to
2 you by your father; is that correct?

3 A There were sold to me, yes.

4 Q How many shares did you, do you own?

5 A At eleven dollars the conversion would be about four
6 million dollars.

7 Q Okay. If the deal went through?

8 A If they were converted at eleven.

9 Q Correct. Let me ask you this. If His Honor were to
10 issue an injunction stopping the vote or adding additional
11 disclosures, would that in your view provide or cause any
12 harm or potential harm to A ten shareholders?

13 THE COURT: That is a little speculative, isn't it?

14 MR. GATELY: Well, he is an executive of A Ten and an
15 A Ten shareholder.

16 THE COURT: I understand. Is he an expert witness?

17 MR. GATELY: No, he is not, Your Honor. I don't know
18 if this is a subject for expert testimony.

19 THE COURT: Well, let's hear what he has to say.

20 How do you think -- tell me all the horrible things
21 that would happen if we delayed all this.

22 THE WITNESS: The biggest risk, frankly, Your Honor,
23 is if the proceedings or the delay causes the deal to
24 extend beyond the drop dead date, in the current
25 agreement, or the 15th of September, Apple Hospitality has

1 an ability to walk from the transaction.

2 THE COURT: Why don't we pretend for just a moment
3 that you have a role in Apple Hospitality. You might be
4 able to predict what Apple Hospitality would do. Would it
5 walk away?

6 THE WITNESS: You know, at this point that would be
7 speculation on my part.

8 MR. GATELY: We have a --

9 THE COURT: Hold on for a second.

10 Are you the president of Apple Hospitality?

11 THE WITNESS: I am the chief executive officer.

12 THE COURT: Oh, CEO.

13 THE WITNESS: Yes.

14 THE COURT: So you might be able to predict what
15 Apple Hospitality would do a little better than say
16 somebody on the street.

17 THE WITNESS: Respectfully, I play a significant role
18 in Apple Hospitality. Apple Hospitality also has an
19 independent board of directors who is the decision-making
20 body in these negotiations. And I abstain, as a board
21 member as well, from the votes on that subject. The
22 independent board members obtained their own adviser.

23 THE COURT: Wells Fargo?

24 THE WITNESS: Wells Fargo was the general corporate
25 adviser. They separately engaged Baird. Negotiated the

1 contract on their own. And received a fairness as part of
2 that. So they acted very much independently as part of
3 the process.

4 THE COURT: All right.

5 So although you are the CEO of Apple Hospitality you
6 are unable to tell us today how you think they would lean
7 if this deal were delayed?

8 THE WITNESS: Definitively. Yes. I can speak to the
9 relative merits of the transaction. I can speak to the
10 potential change in valuation because of the relative
11 performance of the two companies. But I would be
12 speculating to attempt to guess what the independent
13 directors might do.

14 BY MR. GATELY:

15 Q You mentioned the change in value. And you are
16 talking about the value that the A Ten shareholders would
17 receive if they were to vote to accept the deal. Can you
18 please expand on that?

19 A Well, I highlighted in the declaration that was
20 provided for The Court three different factors.

21 One is the increase in value attributable in large
22 part, not in total, to the appreciation of the stock price
23 for Apple Hospitality. The result of that is a per key
24 price, which is in Hospitality how we generally gauge one
25 transaction versus another. That is inflated over where

1 it was originally. On top of that, if you look at the
2 relative performance of the two companies, Apple
3 Hospitality has performed better on a year-over-year basis
4 than Apple Hospitality Ten. And so looking at performance
5 versus projections that were used in the original
6 analysis, that is shifted somewhat. You know, those are
7 factors that I think the board would consider.

8 In addition to that, there was a 45-day go shop,
9 which is not revealed with the superior offer. I think
10 the board of Hospitality would consider that as an
11 additional point as they determine a course of action.

12 Q Did any of the bidders -- I say it again because I
13 mentioned it in opening and it is not evidence -- did any
14 of the bidders comment on the price?

15 I'm talking particularly about Blackstone. If you
16 don't know, say you don't know.

17 A So, I was not aware of who actually bid on the deal.
18 As we looked at the confidentiality agreement, the names
19 of the bidders were redacted. Following the go shop
20 period I happened to interact with Blackstone at a
21 conference. They mentioned that they had reviewed.

22 MR. JARVIS: Objection. Hearsay, Your Honor.

23 THE COURT: Well, he is saying what they told him,
24 and how he knows that Blackstone was one of the entities.

25 I don't think he is going to say what Blackstone

1 thought about the deal, are you?

2 THE WITNESS: I can say whatever you would like me
3 to, Your Honor.

4 THE COURT: Well, I would like you to tell the truth.

5 MR. GATELY: See what a good witness he is, Your
6 Honor.

7 THE COURT: Well, that is how you became aware
8 Blackstone was involved, correct.

9 THE WITNESS: Yes.

10 THE COURT: All right. Thank you.

11 Were you the person handling the negotiations on
12 Apple Hospitality's behalf between Apple Hospitality and A
13 Ten?

14 THE WITNESS: I acted as an adviser to the board, but
15 did not negotiate directly with the Citibank or the
16 special committee.

17 THE COURT: Okay. Who did that?

18 THE WITNESS: The Wells Fargo banker interacted.

19 THE COURT: Okay.

20 BY MR. GATELY:

21 Q The negotiations, what is it -- I will ask the
22 leading if they don't object, but was it mainly between
23 Wells Fargo and Citibank?

24 A The majority of the conversations, yes, were between
25 the two banks.

1 MR. GATELY: Your Honor, shorter than I thought I
2 could be.

3 That is all I have.

4 THE COURT: Thank you very much.

5 MR. GATELY: Thank you, Your Honor.

6 THE COURT: All right.

7 Wait for a moment and see if there is cross
8 examination.

9 CROSS EXAMINATION

10 BY MR. JARVIS:

11 Q Good morning, Mr. Knight. How are you?

12 A I am doing great.

13 Q Have you submitted a declaration in connection with
14 your, the company's opposition to the preliminary
15 injunction right?

16 A Correct.

17 Q Who drafted that?

18 A I received an initial draft from counsel based on
19 conversations that we had had.

20 Q Now, you know that Citibank was the adviser to the
21 special committee, correct?

22 A Correct.

23 Q Citibank got a lot of information about Apple Ten and
24 about Apple Hospitality, right?

25 A Yes.

1 Q Where did it come from?

2 A It came from a shared data room that was populated by
3 management.

4 Q Isn't it true the data room wasn't created until the
5 go shop period?

6 THE COURT: What?

7 MR. JARVIS: Data room was not officially created
8 until the go shop period?

9 THE WITNESS: No, that is not correct.

10 BY MR. JARVIS:

11 Q Who put the stuff in the data room?

12 A I don't know specifically. But it was a group of
13 people from our office.

14 THE COURT: When was the data room created?

15 THE WITNESS: The data room was created when we began
16 investigating. Immediately following the signing of the
17 non disclosure agreement with Apple Ten.

18 THE COURT: Is this down here on Main Street in
19 Richmond?

20 THE WITNESS: The data room, I don't know exactly
21 where it is. Our office is on Main Street, yes.

22 MR. JARVIS: I think it is an electronic data room
23 server somewhere.

24 BY MR. JARVIS:

25 Q Do you know if Ms Gathright put the information, COO

1 of both companies?

2 A I do not know specifically if she up-loaded the data,
3 but she would have been one of the resources.

4 Q And CFO?

5 A Sorry?

6 Q CFO of both companies?

7 A Honestly they would have the most direct access to
8 the information.

9 THE COURT: I think his question is, was Ms Gathright
10 the CFO of both companies?

11 MR. JARVIS: No. No, no. I'm sorry. Let me be more
12 clear, Judge. I am not being clear enough.

13 Ms Gathright, she is COO of both Ten and Hospitality,
14 right?

15 THE WITNESS: That is correct.

16 BY MR. JARVIS:

17 Q And she put information in.

18 A Right.

19 Q She gave information to Citi even though she is an
20 officer at Hospitality, right?

21 A I don't know understand the question.

22 There was a data room that was assembled, that was
23 accessible by both Wells Fargo and Citibank. And
24 management used our best efforts to insure that any
25 request by one bank resulted in information populated in

1 the data room so that it was available immediately to the
2 other bank.

3 Q So it was you and the other managers, the senior
4 managers, Ms Gathright, Mr. Peery the CFO, who decided
5 ultimately how to respond to various requests and what
6 went in the data room?

7 A I am not sure where else they would have received
8 information from the company.

9 Q And you had -- but the people who were making,
10 telling you what was going on, both Hospitality people and
11 both A Ten people, right?

12 A We were also the management company overseeing
13 operations for all of the hotels.

14 Q Now, you indicated that your father sold you some B
15 shares in A Ten that would ultimately net you four million
16 in the case of liquidity, right?

17 A At eleven dollars. That's correct.

18 Q How much did he charge for those shares?

19 A Consistent with what he was charged to purchase.

20 Q So he was charged ten cents a share?

21 A Yes.

22 Q So you are going to get a return of about a hundred
23 times on what you invested, right?

24 A I assume a little more. Assuming that it was a
25 successful transaction, yes.

1 Q Now, I think you indicated that you did not negotiate
2 directly with Citi. That was Wells Fargo's job, right?

3 A Yes.

4 Q Who interacted with Wells Fargo?

5 A The board did. And I did.

6 Q Did you provide instructions on behalf of the board
7 to Wells Fargo?

8 A To the extent they instructed me to do so, yes.

9 THE COURT: Well, did you give them information aside
10 from what the board told you to tell them? If Wells Fargo
11 had a question they would come to you, wouldn't they?

12 THE WITNESS: Well, these are two different things.
13 If Wells Fargo had a question related to the operations of
14 the business, they would come to us. We would provide
15 data in the data room to both banks. If they had a
16 question related to the negotiations of the transaction, I
17 acted in conjunction with the board as adviser to them.

18 THE COURT: So you would sort of call up the board
19 members and see what they wanted to do, and pass that
20 along to Wells; is that right?

21 THE WITNESS: Correct.

22 THE COURT: Okay.

23 BY MR. JARVIS:

24 Q Now, initially when you finally got around to a
25 concrete offer, you offered all stock for A Ten, didn't

1 you?

2 A When you say you?

3 Q Hospitality.

4 A The initial offer I believe was all stock.

5 Q That changed, right?

6 A It did.

7 Q Do you know why it changed?

8 A I do not remember the specific reason that it
9 changed.

10 Q Was it -- Mr. Young testified that he was told by
11 Wells that it changed because they didn't want to deal
12 with what they call the roll out provision. Are you
13 familiar with that testimony by Mr. Young?

14 A I am familiar with that.

15 Q And you were -- did you ever tell Wells to tell them
16 that we don't want to do this all stock, we don't want the
17 appraisal to be like that?

18 A That is not a conversation that I had with Wells.

19 THE COURT: Let me just ask you.

20 Did you all take the all stock offer off the table
21 because you didn't want to do a roll up? Was that one of
22 the factors?

23 THE WITNESS: That was one of the factors that was
24 considered.

25 THE COURT: Okay. Thank you.

1 BY MR. JARVIS:

2 Q Wells provided evaluation for the Hospitality board
3 of A Ten?

4 A Yes. Several.

5 Q Do you know what those valuations were?

6 A I mean, generally speaking, they should have been
7 provided to you.

8 Q They were.

9 They declined to provide them.

10 THE COURT: What?

11 MR. JARVIS: They did not provide us the Wells
12 valuation. We didn't get that.

13 THE COURT: Well, okay. What did Wells value the
14 stock at?

15 THE WITNESS: They provided a range, and the offer
16 price was within that range.

17 THE COURT: What was the range?

18 THE WITNESS: I don't remember the exact range off
19 the top of my head.

20 THE COURT: Let me see if I have this straight. You
21 were coming into court to testify today about this
22 transaction, whether it was fair, and you don't know what
23 the range was for the value of the stock that you were
24 buying. Is that your testimony today under oath in this
25 court?

1 THE WITNESS: We reviewed multiple transactions,
2 multiple analyzes related to the transaction. The range
3 depending on which valuation metric was presented in what
4 the bankers referred to as a football field analysis, and
5 that analysis changed depending on a variety of factors
6 including the relative performance of the two companies,
7 and the other. Generally speaking it was within a dollar,
8 you know, or less on one side or the other. That was the
9 extent of the range. And if it was a cash flow valuation,
10 it would be one thing. If it was based on cap rate
11 valuation, these multiple metrics, which resulted in a
12 variety of football field analyzes, and the stock price at
13 each offer was represented within that range.

14 BY MR. JARVIS:

15 Q Now, Wells did not offer a fairness opinion, did
16 they?

17 A They did not.

18 Q And you had to go to a separate bank who has not been
19 involved in the negotiation of the deal to get a fairness
20 opinion for Hospitality, right?

21 A I am sorry. Had to?

22 Q Well, put it this way. Let me ask you this. You
23 chose to go to a separate bank, Baird, to get a fairness
24 opinion, right?

25 A The board of directors chose to get an independent

1 opinion from Baird, yes.

2 Q Wells provide this opinion?

3 A That, we did not ask them to provide that.

4 Q Why not?

5 A That was under the direction of the board.

6 Q Well, you were there, were you not?

7 A I was.

8 They wanted an independent view of the value of the
9 transaction.

10 Q On the Ten side, they didn't need to get an
11 independent -- they just wanted to go with the fact of the
12 negotiations, right?

13 A I was not involved in that process.

14 Q You couldn't use Wells, right? You chose not to use
15 Wells, right?

16 A I did not chose one way or the other.

17 Q Apple Hospitality chose not to use Wells.

18 A Apple Hospitality chose to engage Baird.

19 THE COURT: You know, we could play word games all
20 day long, sir. Let me just say, I have life-time tenure.
21 We can stay until 2020.

22 Next question.

23 BY MR. JARVIS:

24 Q In your declaration at paragraph 6, talking about the
25 roll up provision, you say that in this case had Apple --

1 and I am reading from the second, I think sentence, in
2 paragraph 6. "In this case had Apple Ten insisted on all
3 stock deals thus triggering the roll out roll up
4 procedures under Apple Ten's articles of incorporation, I
5 would not have recommended the transaction to the Apple
6 Hospitality board. Based on my experience in the REIT
7 industry, I believe it unlikely any buyer would consider
8 such a structure."

9 Why?

10 A The result would be a partial ownership of the
11 acquired entity.

12 Q Well, let's go through that.

13 You are presuming that shareholders in A Ten had the
14 right to chose after an appraisal was done, either cash or
15 to keep A Ten stock, right?

16 Is that the underlying assumption for what you just
17 said?

18 A No. It existed as a possibility.

19 Q But isn't that a possibility that was solely within
20 the control of A Hospitality as a roll up offer? In other
21 words, you could chose whether they got cash, whether they
22 kept their stock, right? That was your choice, not their
23 choice, not A Ten's choice. That was Hospitality's choice
24 right?

25 A Well, one of two things would have happened. Either

1 the shareholders would have retained their shares, or
2 Apple Hospitality, the acquirer, would have been left with
3 a mix of stock and cash that they would not have known at
4 the beginning, at the onset, when they valued the
5 transaction.

6 Q In other words, you might have had to put out, if the
7 roll up had been in you might have to fork out more cash
8 than you would have, than you thought originally?

9 A That exists as a possibility.

10 Q I mean, they could have kept their, what you offered
11 if the appraisal came in at or about your offer price,
12 right?

13 A Yes.

14 Q So only if the appraisal came in higher, i.e. an
15 independent appraiser said it was worth more, would you be
16 faced with the possibility that you might either have to
17 pay out more cash or leave them with the A Ten shares?

18 A No, that is not true. Because they would have the
19 choice of cash in that case or retaining non-liquid share.

20 Q That is not true. That would be your choice under
21 your articles --

22 A That is what I am saying. We would have the choice
23 to do one or the other, which would mean, either we would
24 be stuck as an acquirer, we meaning Apple Hospitality,
25 with an un -- with two classes of shares. One which was

1 completely illiquid, or an indefinite amount of cash that
2 we would have to put into the transaction, which would
3 change the valuation.

4 Q Right. And that is only if the appraisal came in --
5 in other words, you were as concerned, right, the
6 appraisal might come in higher than what you were paying?

7 A No, I was not concerned about that.

8 Q What you wanted. Then they could just take the A
9 Hospitality shares and sell them, whichever got them more
10 money, right?

11 A My understanding is that at the point that is
12 exercised then taking Apple Hospitality shares was off the
13 table.

14 Q Then I understand that incorrectly.

15 A You do.

16 Q The first option is after this appraisal, you have to
17 offer them the deal that was on the table. If they don't
18 want it, then they can go to cash or keep their shares at
19 your discretion?

20 A Okay.

21 But for the record, I had no concern that appraisal
22 would provide a higher valuation.

23 Q Then why did you recommend against allowing the roll
24 up procedure? I say "you," Apple Hospitality board?

25 A I didn't. I said that I would recommend against

1 that.

2 Q Okay.

3 Now, you have also indicated --

4 THE COURT: Well, if it's the same thing, why would
5 you recommend against it? Just because you didn't want to
6 have this hybrid of stock and --

7 THE WITNESS: Yes. The reality is, if they are left
8 with their existing shares -- again, this is my
9 understanding -- if they are left with their existing
10 shares, and they are not publicly traded, that is not a
11 good outcome for anyone. It is not a good outcome for the
12 acquiring company, it is not a good outcome for the
13 shareholders who retained those shares of stock.

14 BY MR. JARVIS:

15 Q They had the option of taking your your A Hosp
16 option -- they only had the option of taking your A Hosp
17 shares, or you had -- they had the second option, your
18 call, either take cash or keep your shares. If they
19 wanted liquid they could always take the deal, right?

20 THE COURT: All right.

21 MR. JARVIS: I think we belabored this. I will move
22 on.

23 THE COURT: You have argued with the witness enough.

24 MR. JARVIS: I agree.

25 BY MR. JARVIS:

1 Q Now, in paragraph 7, you know, and 8, you sort of go
2 through this change in the pricing it, and you say that
3 one of the things that might happen is, gee, the price
4 has, because the price Hospitality increased the deal
5 becomes a little bit more valuable to the Apple Ten
6 shareholders and the board. If the drop dead date went
7 past because an injunction was awarded, might decide to
8 blow up the deal and renegotiate it for for a better deal,
9 right?

10 THE COURT: What was the question? That was a little
11 on the long side there. I sort of lost my way.

12 MR. JARVIS: True. Not as scripted as I would like
13 it to be. We weren't expecting this. I apologize.

14 THE COURT: That is all right.

15 BY MR. JARVIS:

16 Q So, you believe that the compensation that A Ten
17 shareholders, as we sit here today, has increased a bit
18 over what it was in the spring because of the increase in
19 Hospitality share price, right?

20 A Yes.

21 Q And as a result of that potential increase in
22 Hospitality A Ten shareholders, the board in your view
23 might consider blowing up the deal and re-negotiating it
24 if the drop dead of September 15 passed?

25 THE COURT: Which board?

1 MR. JARVIS: Board of Hospitality. Right.

2 THE COURT: Okay.

3 BY MR. JARVIS:

4 Q Now, in your affidavit you looked at the 10.85 share
5 price. That is the one you used as an illustration,
6 correct?

7 A Yes.

8 Q And that was a share price in April. What was the
9 share price of Apple Hospitality on March 24 when the
10 board approved the deal, when the board of Hospitality
11 approved the deal?

12 A I don't remember the specific.

13 Q If I told you it was \$19.32 on March 24, would you
14 have any reason to doubt that?

15 THE COURT: Well, whether he has reason to doubt it
16 or not is really irrelevant.

17 Let's move on to something else.

18 BY MR. JARVIS:

19 Q I am telling you the price on March 24th, at least
20 closing price, was \$19.32 a share. Yesterday's price
21 counsel said 19.71. I saw 19.70. Take your pick. That
22 is about a 38 cent increase over what it was when you
23 approved it, right?

24 THE COURT: Well, 32 cents.

25 BY MR. JARVIS:

1 Q 38, 39 depending. I saw 70, he saw 71.

2 Right?

3 A Okay.

4 Q That would be less than two percent increase if you
5 do the math. I can tell you it is less than two percent.

6 A Okay.

7 Q Are you saying that the Apple Hospitality board,
8 because the Apple Ten shareholders were going to receive
9 two percent more than they would have on the day the deal
10 was approved might consider blowing up the deal and
11 renegotiate it?

12 A Yes, I am saying that exists as a possibility.

13 THE COURT: All right.

14 MS WINCHESTER: Thank you, Your Honor.

15 THE COURT: Thank you.

16 Any redirect?

17 MR. GATELY: Yes, Your Honor, briefly.

18 THE COURT: Hold on a second.

19 Ms Edwards, do you have any questions of this
20 witness?

21 MS EDWARDS: I do not, Your Honor.

22 THE COURT: All right.

23 Mr. Gately.

24 MR. GATELY: Yes, Your Honor. Thank you very much.

25 REDIRECT EXAMINATION

1 BY MR. GATELY:

2 Q Two areas. One on the Baird Wells Fargo.

3 Was Wells Fargo ever asked to do a fairness opinion?

4 A Not to my knowledge.

5 Q Did Wells Fargo ever refuse or indicate that they
6 would refuse to do a fairness opinion?

7 A No.

8 Q Why was Baird chosen by the board to do a fairness
9 opinion?

10 A They requested -- it was their desire to have an
11 independent third party validate the price.

12 Q Their, being the board of directors?

13 A Meaning the board of directors, independent members.

14 Q On the roll up transaction -- and, Your Honor, this
15 is a mountain of paper, among other things exhibit 18 to
16 the Albert declaration and the roll up provision, I think
17 it has said is in the bylaws. It's not. It is in the
18 Apple REIT articles of Incorporation.

19 THE COURT: Oh, okay. That is a telling point.

20 MR. GATELY: That is not so telling.

21 It is article ten of the Apple REIT Ten articles of
22 incorporation.

23 THE COURT: All right.

24 BY MR. GATELY:

25 Q And can you explain to the The Court why as buyer in

1 general a roll up transaction would not be desirable?

2 A Beyond what I already explained?

3 THE COURT: You explained it pretty well.

4 BY MR. GATELY:

5 Q Okay.

6 Then there is one point I want to make because we
7 talked about an appraisal of the corporation.

8 Would you please read the first sentence of article
9 ten?

10 A "In connection with any proposed roll up transaction
11 an appraisal of all the corporation's assets shall be
12 obtained from a competent independent expert."

13 Q So the appraisal is of the assets, not of the entity.

14 A That is correct.

15 Q That is all I have, Your Honor.

16 THE COURT: Okay.

17 So are you saying that when they do the roll up
18 appraisal they wouldn't look at the liabilities? Is that
19 the point of the question there, Mr. Gately?

20 MR. GATELY: Your Honor, my point was, it is not a
21 valuation of the entire entity, which I think was implied,
22 such as the valuation that the investment bankers were
23 doing. It is of what assets you have. And bear in mind
24 the obvious, this is a real estate investment trust. What
25 real estate investment assets do you have? My main point

1 is it was not an appraisal of the entire company as Wells
2 or Citi or Baird did.

3 THE COURT: And so you are saying then that it would
4 not look at -- would it look at the, like the mortgages on
5 the property to determine the value of the assets? You
6 wouldn't say that, for instance, the hotel down the street
7 was worth a hundred million dollars when it has a
8 90 million-dollar mortgage on it, would you?

9 MR. GATELY: I expect the answer is yes, but that is,
10 with all due respect, a better question for Mr. Knight
11 than to me.

12 THE COURT: Well, okay.

13 I am just trying to get at what point -- so what you
14 are saying is they wouldn't look at the value of the
15 corporation as an on-going entity versus the value of its
16 real estate computers and so forth?

17 MR. GATELY: You wouldn't get a, this is eleven
18 dollars a share, this is eleven or ten dollars a share.
19 That is not what this is designed to do. That is my
20 point.

21 THE COURT: What would you get?

22 MR. GATELY: You would get, you would get a value of
23 the assets, and there would be limitations, as Mr. Knight
24 said, on the ability to get all of the stock. It's
25 something -- and he made the point -- that a buyer is on

1 the -- it is desirable from the buyer's standpoint.

2 MR. JARVIS: Could I ask a couple questions on that
3 point?

4 THE COURT: No.

5 MR. JARVIS: No. Okay.

6 THE COURT: No. No recross.

7 All right.

8 Thank you, sir. You may step down.

9 (Witness stood aside)

10 THE COURT: All right.

11 Do either of the defendants have any more witnesses?

12 MS EDWARDS: We do not.

13 MR. GATELY: No, Your Honor.

14 THE COURT: In that case then, I will hear argument,
15 although I think I have heard a pretty fair amount of
16 argument already today. Let's hear from the plaintiff?

17 Mr. Jarvis.

18 How long do you think you are going to take?

19 MR. JARVIS: I don't know because, I am sort of
20 trying to triage a little bit as I go through like a
21 13-page outline. But we talked about some topics. I
22 don't want to belabor what I already said.

23 THE COURT: An hour closing?

24 MR. JARVIS: Probably.

25 THE COURT: Okay.

1 MR. JARVIS: Do you want to do it now, or will you
2 need a break?

3 THE COURT: We will -- we will take it now.

4 MR. JARVIS: Okay, your Honor.

5 Let's start with the Willard decision, because Your
6 Honor has quite clearly expressed your concern that we
7 simply can't get past Willard given the facts of this
8 case.

9 THE COURT: Well, you have -- here is the thing.
10 That when you combine Willard with the standard that
11 applies to a preliminary injunction, which is, I think
12 that you have got to show a strong possibility of
13 prevailing, not just a strong likelihood of prevailing,
14 not just that you can get it to the jury, which I think
15 you can -- make no mistake about that -- if this case goes
16 to the jury for them to decide, at least on the damages
17 aspect, yes, I think Willard does provide you some
18 difficulties at this stage of the events.

19 Now, one of the problems that they run into is that
20 all of their arguments involved disaggregating all of the
21 factors that one would look at. And one of the points I
22 think you made in your opening, which was a good one, is
23 that you look not only at -- you have to look at all of
24 them together. You don't just look at, was the guy in the
25 same -- were they both in the Rotary or something like

1 that. You look at that, plus you look at all these other
2 factors to try to see, sort of in a, I think somebody used
3 the used the word "holistic," in a holistic way.

4 MR. JARVIS: I think that is my word.

5 THE COURT: In a holistic way how these things factor
6 together. And that is the jury function. But also my
7 function at this point, to determine whether you have a
8 strong likelihood of demonstrating that.

9 MR. JARVIS: Look, I think I understand where Your
10 Honor is are going here. I recognize. But let me give a
11 run at least on a couple factors to try to see if we can
12 talk about Willard in a way to, that looks more favorable
13 to you, to me, than Your Honor thinks.

14 Willard was obviously, we all know, as I said many
15 times -- and I am sure that case has been read a hundred
16 times by people in this room. It is a transaction that
17 everybody knew everybody, everybody knew everything.
18 Everybody was a director. Everybody was a shareholder.
19 Everybody was conflicted. I mean, two directors has their
20 son, the other director had his own competing bid. It was
21 a mess.

22 And the Supreme Court of Virginia had to do the best
23 they could. What they ultimately decided was, these guys,
24 they looked at valuation opinions, the valuation opinion
25 said it was fair, and basically they followed what -- to

1 the total extent -- they didn't have much. They didn't
2 have, frankly, nearly the level of advice that Citi gave
3 to the special committee here. But to the extent there
4 was anything you could discern from what they said, what
5 they have done is not inconsistent with what the advisers
6 told them. That is really what it holds.

7 And then really, as I said, I think, to be perfectly
8 honest, that, you know, basically these guys are going to
9 vote for it any way, they are the shareholders. They have
10 unfettered right to use their shares. You have to view
11 their overall result, even if the board members had thrown
12 up their collective hands, we are all conflicted, we are
13 throwing it to the shareholders. It is the same three or
14 four people, same result would occur.

15 So if that is the same result, that would -- we are
16 not going to validate this thing. You have to look at the
17 facts. Well, they were shareholder they could ratify
18 there. But on the director point, you know, to the extent
19 there was information from advisers, it is not that much,
20 not like what we have here, they followed it. Here, and
21 in was a case laid out briefly this morning, Your Honor,
22 they simply did it.

23 I mean, let's talk about the conflicts of Mr. Colton.

24 THE COURT: What advice from their adviser did they
25 ignore?

1 MR. JARVIS: Well, okay. If you look at --

2 THE COURT: Talking about Mr. Young.

3 MR. JARVIS: Not just Mr. Young. But, look at the
4 decision to negotiate only with Hospitality. Mr. Colton
5 in his deposition, I don't need to negotiate with anybody.
6 Really? They said Citi told us to do the go shop and not
7 to the pre market check. That is not just true. We went
8 through some of Mr. Young's testimony on that. I mean,
9 not saying Mr. Colton is lying, I am really not. I'm
10 saying, look, these things are some time ago, he
11 misremembered, remember the way he wants to remember,
12 everybody in this court room has done that on more than
13 one occasion. They are all going to remember the way you
14 remember. But what do we we see? Citi in one of the very
15 first slides -- if you want, Your Honor, wants to look at
16 it, this was in a presentation of the 13th, but I don't
17 have that copy -- I tried to bring it but it got screwed
18 up in the processing -- I have a version of the slide. It
19 is defendant's exhibit 9 at page 43.

20 And if you look at that slide, you know, it lays out
21 right at the front, City is telling them, defendant's
22 exhibit 9 page 43.

23 THE COURT: I don't have it.

24 MR. JARVIS: I will be happy to show my page of it as
25 soon as I can find my exhibit.

1 THE COURT: One of the things you could do is put it
2 on the overhead thing we have over there that will put it
3 up on the screen so all of can see it.

4 MR. JARVIS: I have used that at trials in the past,
5 I'm not the most -- but I'm happy to give it a go if you
6 Your Honor would prefer.

7 THE COURT: The ELMO.

8 MR. JARVIS: The ELMO, yes, I used it before. I like
9 ELMO. I am a low tech kind of guy. If it will turn on,
10 but if not, I can hand it up.

11 THE COURT: All right.

12 MR. JARVIS: It has my handwriting. I want to show
13 it to defense counsel. It is my copy. If you have a
14 better copy I could use yours to give it to the Judge.

15 It's the same slide.

16 MS EDWARDS: We have got it.

17 MR. JARVIS: Mine was messed up.

18 THE COURT: All right.

19 MR. JARVIS: Let --

20 THE COURT: Let me look at it here.

21 Okay.

22 MR. JARVIS: Look at the slide.

23 It tells you, this is Citi, mind you, this particular
24 slide was presented to the special committee on the 13th
25 of January. Right at the front end of the process. What

1 do they say? They are the target, remember. A Ten is a
2 target. What is most favorable? Do a pre-signing market
3 check. What is the most favorable? Do a pre-signing
4 market check. Less favorable, go shop, obviously. Less
5 favorable, go shop (unintelligible).

6 So, first we know Citi is telling them the best way
7 to go here is pre market check. What else do we know? We
8 know that Citi told the board, we know people. You know.
9 We are Citi, we never sleep. We know a number of buyers
10 in this area who might be interested who we could approach
11 on your behalf. They were never authorized to do so even
12 though Citi told them what is best thing to do with a
13 target, what is the most favorable, do a pre-signing
14 market check.

15 THE COURT: So this is given to them?

16 MR. JARVIS: Early on. First meeting with Citi.
17 First non, post --

18 THE COURT: Was this when they were negotiating with
19 Citi to see if they wanted to hire Citi?

20 MR. JARVIS: Post. After.

21 THE COURT: "Trojan" is a word here for the target
22 company.

23 MR. JARVIS: Sorry. Trojan is, yes, somebody -- I
24 had to ask Mr. Young, who, one of his assistants, like a
25 college football name, so they had Hoya for Georgetown,

1 Trojans for S C. I think the guy went to S C or something
2 like that.

3 THE COURT: All right. Okay.

4 MR. JARVIS: So we see this. We know, I mean, look,
5 Mr. Young suggested throughout, we didn't really tell them
6 what to do, we just gave them options and generalized
7 advice. You can see the advice, do a pre signing market
8 check. That is the most favorable. And we have people we
9 can go to.

10 As we discussed a few minutes ago in my opening, Your
11 Honor, on the eleventh, when we had that little colloquy
12 about the bid of the eleventh is inadequate. They say,
13 hey, you know, we are going to consider, actually you
14 might want to keep this, never mind -- it was inadequate.
15 We are going to consider pre signing market check. Mr. --
16 we talked about it a couple times with Mr. Young's people.
17 Said, we don't want to do that process. We are not
18 interested in being competitive bidders. We don't want
19 competition. Cool. Happy ending. That is the last you
20 hear right there about a pre market check. Done. So what
21 is the first point you have got? A Hospitality didn't
22 want competitive bidding process. Citi was suggesting
23 one. That was the best option. They told them they had
24 people to go to. They were never authorized to reach out.
25 They did what A Hospitality wanted.

1 THE COURT: Well, let me ask you. Do you have some
2 evidence that if it had gone out the outcome would have
3 been different in any way? Do you have like an expert
4 that will say that, or anything like that?

5 MR. JARVIS: We do, actually. I mean, look --

6 THE COURT: Their evidence is not here.

7 MR. JARVIS: Well, I am going to take Your Honor, and
8 I have copies for all, of the Dell opinion. Dell opinion
9 was an appraisal that was done in Delaware of Dell
10 Corporation.

11 THE COURT: No, no. Not something in Delaware, but
12 something here in Richmond. Have you gotten somebody to
13 look at this and give you an opinion that this would have
14 turned out differently if there had been a pre-bid
15 shopping of this project?

16 MR. JARVIS: We haven't. But, as I say, Delaware,
17 Dell opinion. I won't ask Your Honor to transfer, but
18 there are footnotes I will show Your Honor where it goes
19 through a lot of the academic literature. In fact, in
20 that particular case the petitioner did retain an expert,
21 a guy named Guhan Subramania.

22 COURT REPORTER: Whoa, whoa.

23 MR. JARVIS: Guhan, G-U-H-A-N, Subramania,
24 S-U-B-R-A-M-A-N-I-A, who is a professor at Harvard Law
25 School, and is an expert on corporate transaction

1 takeover. He actually did an expert report there, not for
2 Dell particularly, just in general, on MBO transactions,
3 management is taking a company, which is more like what
4 happened here.

5 THE COURT: You know, he didn't testify in this case,
6 he testified in another case.

7 MR. JARVIS: Yes, but --

8 THE COURT: You need to talk more slowly, please, so
9 Mr. Halasz can take it down.

10 MR. JARVIS: Yes. I do apologize. I am not trying
11 to be intentionally offensive.

12 THE COURT: I know, sir, you not are trying to. It
13 is hard to slow down.

14 MR. JARVIS: But, I mean, certainly, you know, could
15 I get Mr. Subermanian to show up here for a trial later --
16 not today, no, but he did testify, and will show, and we
17 will go when I go to get to go shop a little bit, is that
18 go shop is called pure go shop where no restrictions can
19 work. I mean, he cites as a footnote in there, recites it
20 can work, actually create a higher initial bid. But, it
21 doesn't work in two contexts, Your Honor.

22 THE COURT: It doesn't work what?

23 MR. JARVIS: In two contexts.

24 One, where there is an MBO, management is coming in,
25 because management -- well, you know, Your Honor, let me

1 make this a little easier. Since we are there.

2 Here is a copy.

3 THE COURT: What are you handing out now?

4 MR. JARVIS: Decision of the Dell court. I am not
5 going to ask you to look at the opinion, just look at the
6 footnotes. Typical lawyer. Likes the footnotes.

7 And if you look towards the back at basically on the
8 opinion in the lower right corner of the page number, page
9 45, you will see the footnote beginning with 35. You will
10 see Vice Chancellor Lassiter, really, really likes this.
11 But if you look at sort of footnote 35 and footnote 36.
12 There is talk, and this is lot of academic literature on
13 the efficacy of go shops -- I won't read it to you --

14 THE COURT: Which footnote are you on?

15 MR. JARVIS: Thirty-five and 36 on page 45.

16 THE COURT: Thirty-five and 36.

17 MR. JARVIS: Right. This recites to
18 Mr. Subermanian's, one of his articles he wrote. I think
19 I even spelled it right. And then also the expert report
20 he had done in that particular case. And some of his,
21 what his opinions are, that is in the MBO context,
22 because, you know, you are trying to -- management knows
23 more about a corporation, tends not to be (unintelligible)
24 even in a go shop.

25 Thirty-six talks about an article which cites a

1 gentleman named Marty Lipman, who is familiar, New York
2 deal guy, you know, Whactel, Lipman, Rosen and Katz, a top
3 deal guy. He says, look, a bidder at the front is worth
4 50 percent. A bidder at the end is worth two percent. He
5 is (unintelligible) defense all these type cases. He has
6 no incentive to help my side of this, and he is telling
7 you 50 percent at the front, two percent at the back.

8 If you look at footnote 37, a pure go shop, there is
9 academic evidence suggesting a pure go shop will in fact
10 increase the value. I won't deny that. That it is there.
11 The article says that. What research says. But then you
12 have got to look down to the next page, page 47, and talk
13 about matching rights. And we haven't really talked all
14 that much about matching rights in this particular case.

15 In fact, it wasn't brought up in the briefing, quite
16 frankly. But in the merger agreement here, which I do not
17 have a copy for, Your Honor -- for that I apologize -- if
18 you look at section 5.4 little (e) big D, little before
19 big, there is a provision that deals with the go shop and
20 superior bids. Under that provision, the one I read
21 before, 5.4 (e) D, if there is a superior bid in the go
22 shop, then the A Ten board has got to go to Hospitality
23 board and give them five days to negotiate. To see if
24 they want to match that superior bid. That is what is
25 called a matching right, Your Honor. What a matching

1 right does, if you look at the research that is in
2 footnote 41 on the top of page 47, basically says, it is
3 the same as the right of first refusal, and it kills the
4 efficacy of a go shop. That is what all the research
5 says.

6 And why? Makes absolutely good sense as to why. You
7 know that management has put a price in on the company.
8 Management knows that company better than anybody. They
9 know what it is worth because they are the managers. Much
10 better than you as an outsider will ever understand. You
11 can come in. And if you top anything that is within the
12 realm of reason, what it is really worth, you can be
13 assured they are going to match it. Will match it. They
14 are not making as much as they would make, but they are
15 still making money. How do you get the deal if you are a
16 third party when management has matching rights? You over
17 pay. Who is is going to come in in a situation knowing
18 that in order to get this I have got to over pay. Nobody.
19 That is why they don't work when there is matching rights.
20 And the problem is, that I don't believe that anybody ever
21 really told the special committee that. I asked
22 Mr. Young. I said, Mr. Young, ever done a go shop? I
23 didn't ask because I didn't think he knew how to sell a
24 company. He clearly did. That is what he said, I know
25 how to sell a company, you do it here, you do it there.

1 What does it matter? It matters because timing is
2 everything when you are trying to sell it before there is
3 a bid in place for management, that is one thing. But, I
4 tried to get him to say, in all the situations you know of
5 where somebody topped that go shop -- he didn't know
6 anything -- didn't want (unintelligible). In fact, if you
7 look at the research, that is in the, I can actually do
8 better than that, if you look at footnote 35 in a standard
9 go shop it is about ten percent of the time there is
10 topping bid. I mean, (unintelligible) that is not very
11 often. They didn't know that. And then Mr. Colton, if
12 you look at his testimony, yes, there is Merit Star Wood
13 deal. That was a go shop. That got a lot better value,
14 except, unfortunately -- and that is what he is relying
15 on -- it didn't. It was a market check. Wasn't a go
16 shop. Had it wrong.

17 So the whole point here is that when they are denying
18 the market check; A, doing it because A Hospitality
19 doesn't want it, any kind of competitive process; and B,
20 is go shop panacea, they did not really inform themselves
21 of whether it really would provide the value that the
22 market check. They say to Citi, saying Citi knows it.
23 Market is worth more. That is why it is much more pro
24 target than a go shop.

25 Let's go to the roll up provision. The roll up

1 provision, which Mr. Knight, Justin Knight, and I
2 discussed Your Honor had a little bit of discussion on it,
3 you know, it is in there not, I might add, because of the
4 largess of the Knights when they created this entity, it
5 is something that comes, I think I indicated before, from
6 the NASSA, North America Securities Administrators
7 Association -- they are calling themselves the largest and
8 oldest shareholder protection outfit -- and it is required
9 to be in, I believe in Virginia, but certainly most
10 states, it is required to be included in a non traded
11 REIT. Because, well, they are non traded. So there is no
12 indication of what they are really worth. And they, what
13 you need is an independent appraisal, whether it of the
14 assets, which I might argue, frankly, are more favorable
15 than if you look at the entity, because if you look at the
16 assets you don't have that big management fee, you know,
17 that is a corporate level thing. They have management a
18 fee that A Ten pays to the Apple entity, looking at those
19 individual assets. For all I know, it is sitting on a
20 piles of land worth a fortune, much more than operating
21 value. So to suggest that, you know, oh, I am not sure
22 what counsel was suggesting there, but assets might be a
23 better way to go from my perspective in just looking at
24 the; corporation as holistic, to use that favorite word
25 again.

1 So the commission fee is put in there by the NYSA,
2 not because they really wanted it there, but what is the
3 first thing once they realize that their all-cash offer
4 was implicated, was get it out. We are not doing a deal
5 structure, or we have this. And how did that come, you
6 know, comes in, February 11, there are meetings at the end
7 of February. The board is briefed on it by Mr. Robertson.
8 The board is briefed by Mr. Robertson on the 29th of
9 February of a discussion between Mr. Robertson and his
10 counterpart at Hogan Lovells where they discuss between
11 the two parties the roll up provision. So special
12 committee counsel discusses it with Hospitality counsel.
13 They are briefed on that. And then all of a sudden on
14 March 4 comes in an offer, and Mr. Young was told --
15 Mr. Knight confirmed it -- we are changing the structure
16 of the offer. We don't want that thing. We don't like
17 it. Why? Because it might cause them to pay more money.
18 That is why. If somebody independent is looking at it,
19 they might have to pay more cash. And if it is not more
20 cash, it is not higher than any rational shareholder will
21 take the deal. Only if the appraisal is higher are they
22 put in a position of having to pay either more cash or
23 leave them with their shares if they didn't want to pay
24 the cash. And they didn't to be put in that position.

25 THE COURT: It is not exactly addressing the Willard

1 case. The Willard case says -- in the Willard case there
2 was just a flat out offer of \$600,000 more than one of the
3 people was -- than the offeror was making, and The Court
4 said, well, don't have to take that because you can
5 consider other things. Although, what the other things
6 were in that case, I am not sure. Other than the fact
7 that one of the offerers was their son.

8 But, you know, you are talking about money here.

9 And --

10 MR. JARVIS: I saw that, and I'm not going to pivot
11 on you, Your Honor, so you have got all that. That is a
12 pretext. That is what the court had. So Citi, the Citi
13 knew that this was a valuable right. How --

14 THE COURT: What?

15 MR. JARVIS: The Citi knew this was valuable, and
16 this was something that the special committee should give
17 up. How do we know that? Because on the 11th of March
18 Citi made a presentation to the special committee. And if
19 you look at it, oh, dear me -- I believe it is exhibit,
20 plaintiff's exhibit 22, which it is, indeed.

21 The Citi said, okay, it is time to come with a
22 counteroffer. And we are going to put in our little
23 proposal here -- and I can do this from memory so I can
24 hand this up to Your Honor to see what I am talking about
25 here -- from the Citi proposal, presentation to the board

1 on the 11th of March. Citi has, says on top, indicative
2 counter proposal. And it gives them two options. Option
3 A and B. The options differ only in the deal protections.
4 But both of them suggest an all stock counter. That is
5 what they are proposing is, that is the decision here,
6 that is what they wrote up. They also wrote up, I might
7 add, time sheets for both those options, which could be
8 given to Apple Hospitality. Those are included in exhibit
9 20 and 21.

10 They didn't write up a proposal for a mixed cash and
11 stock counteroffer. They didn't write up term sheets for
12 mixed cash and stock counteroffer. They wrote up a term
13 sheet for an all-stock counteroffer. That is what they
14 said.

15 Mr. Young said, oh, a little disingenuous. I found
16 him generally a credible man, but oh, we were responding
17 to the February 11th offer, even though there had been new
18 offers before, and Apple Hospitality flat out told them,
19 by the way, we are putting a new offer in, and we don't
20 want all stock, we don't want the roll up rights.

21 What is Citi essentially trying to tell the special
22 committee to do here? Counter with all stock. And guess
23 what? On the 11th of March the (unintelligible) countered
24 with a mixed stock and cash proposal, a buck ten and point
25 561.

1 They essentially gave that away. The adviser is
2 telling them what to do. And they are not listening.
3 That is why it's not like Willard.

4 Willard -- to the extent they got advice, they were
5 in. Here, they got advice here. If that isn't advice, I
6 don't know what advice is. And they are not following it.

7 THE COURT: What are indicative counter proposals as
8 opposed to counter proposals?

9 MR. JARVIS: I think -- that was one of the ways Citi
10 dealt with, they didn't say we are telling you what to do,
11 they are saying, gee, guys, here is the kind of counter
12 proposal you could make. Now, they could have put money
13 in, they could have first looked, I thought it would be A,
14 you know, all stock, B, mixed cash stock. No. The
15 difference between A and B differs within the way they
16 dealt with the go shop. One set out, I will negotiate
17 later, one proposes -- But, both of them, they come up
18 with two. And they are both all stock. Why? Because the
19 Citi knew it was a valuable right. They are trying to
20 tell them, don't give this thing away, let's keep fighting
21 for it. Special committee just gave it away. There is no
22 indication in the record that they asked for additional
23 consideration directly related to the change in
24 consideration. They did ask, look, look, the counter
25 proposal is more valuable than the one on the fourth. I

1 am not going to deny that. But there is no suggestion
2 that they asked for more money because they were giving up
3 this valuable right. They used that negotiating chip?
4 None. No one suggested that at all. Also, I asked, did
5 anyone ask you -- you are investment banker, you value
6 things -- never asked to value it. What is it worth?
7 What are we giving up? No. Never asked. What is it
8 worth? Didn't ask. So, again, unlike Willard, they don't
9 follow their advice.

10 At the end of the day -- I went through this -- I
11 will be brief -- they got point 5 on a buck, they got two
12 percent increase, as I said. So that is not quite on
13 Willard, more, admittedly, on the price.

14 But what I am trying put across here is that, you
15 know, you heard from Mr. Glade Knight, that Mr. Colton
16 knew what Mr. Glade Knight wanted. He wanted A Ten and A
17 Hospitality to come up with an option on the A Hosp board.
18 And get it done. Whether he is doing it overtly or just
19 in the back of his mind, that this is his buddy, and this
20 is what they all wanted to do, they are going with what A
21 Hospitality wants at every single juncture.

22 We have one final on the process.

23 THE COURT: You know, I have read your briefs. So,
24 if these are points that you have covered in your brief --

25 MR. JARVIS: I am trying to -- this is quick. One

1 reason I want to read you some testimony.

2 At the end of the day, you know, at the beginning of
3 the process, I will not suggest otherwise, they had a
4 status quo option. It is in their early briefing papers.
5 I think it is in the brief of the 13th. And then status
6 quo, Apple Hospitality or Apple Ten as a separate company
7 sort of goes away. And then in a presentation on the
8 18th, on the 18th Hospitality giving their best and final
9 offer, point, a dollar and point 520. And so the meeting
10 on the 21st they have a slide. And plaintiffs' exhibit 33
11 at 3. Again, as is my want these days, I think I will
12 hand it up to Your Honor so you can see it.

13 We didn't go in this because. I will have more to
14 say than maybe is in our brief.

15 I asked Mr. Young, what does this represent? This
16 is the Young transcript at page 155.

17 "Question: Was Citi presenting an option of
18 basically this deal isn't good enough? Don't do anything
19 for a while?

20 "Answer: Yes. That is correct.

21 "Was that Citi's judgment as an option, they should
22 at least consider?

23 "Absolutely, yes."

24 Okay.

25 THE COURT: What page is this on in his testimony?

1 MR. JARVIS: 155, Your Honor.

2 THE COURT: Okay.

3 You know, the thing of it is that he had tried to
4 negotiate for more with Wells Fargo earlier. He said on
5 page 110 -- and you asked him, or somebody asked him --
6 "What kind of guidance did you provide to Wells Fargo in
7 connection with the economics after the February 11
8 offer?"

9 And he said, "It was insufficient and that the
10 special committee is looking for more value, but
11 apparently, they stood -- they stood on the ground."

12 MR. JARVIS: Right. And at the end of the process,
13 almost here 5.20, 520, I'm sorry, he is still saying it
14 isn't good enough. And that is what he is tell the
15 special committee. It isn't good enough. Don't do a deal
16 with these guys. They are not moving.

17 THE COURT: He said he was, I mean -- okay.

18 MR. JARVIS: All along.

19 THE COURT: Now, he didn't -- I don't know whether he
20 said that to the special committee, but he said it to
21 Wells Fargo, which is a whole different story. People
22 negotiate and they say things -- not that I would ever do
23 this -- but "My client will never settle for this value,"
24 when in fact, you know your client will settle for that
25 value.

1 MR. JARVIS: I may have been in a negotiation like
2 that.

3 THE COURT: I bet you were.

4 MR. JARVIS: But look at, that is what the
5 significance of this quote is.

6 When Citi is presenting, he wasn't presenting options
7 to Wells, he was presenting it to the special committee.
8 This deal isn't -- we are there. They are giving you
9 their best and final. It isn't good enough. Consider
10 status quo. And he said, look, if you look out there
11 there are negative things. Status quo. Okay? For two.
12 If you look at that, one deals with you may miss the
13 cycle, and the other than one deals with Apple Hospitality
14 might walk if you decide to tell them to go away now, you
15 know, and do it later. Because you are essentially
16 telling them it is not good enough, basically.

17 I asked him about those two, as you might guess. I
18 like to talk so much. And he said, look, as to the cycle,
19 you know, for the lodging industry goes down, and then a
20 few years down the road it is not good enough. We are
21 talking about two years. We are not talking about ten
22 years. We will try to do something, give or take seven
23 years. Not hard. And said, wasn't a projection for the
24 business for the next two years turning soft, yes. And
25 wasn't much cycle risk. Yes.

1 You can look at 156 on that.

2 THE COURT: You know, the thing of it is, I have
3 always been taught, don't try to try to predict the
4 market. And that is probably a pretty good idea in the
5 hotel industry as well.

6 Who knows whether, for whatever reason, I don't think
7 anybody anticipated the whole economy tanking back in 2008
8 and 'lo and behold it did.

9 MR. JARVIS: A gentleman named Paulsen in New York
10 apparently predicted it, but made about 15 billion
11 dollars. But he was a little bit of a voice in the
12 wilderness.

13 THE COURT: Well, there you go.

14 MR. JARVIS: But these (unintelligible).

15 I don't doubt that both Mr. Knights know their
16 business. Apple REITS have done well. They knew, they
17 knew that over the next couple years at least hospitality,
18 can look at the general economy, it could tank. But
19 basically you can look at where we are going to be, and if
20 you think they are projecting, and this is near term, two
21 years out, that these things would do way above historical
22 long term rates. Not below. Way above for the next two
23 years. So that is the cycle we are dealing with. Five
24 years out, who the heck knows, Your Honor? Two years out
25 it is getting better. That is the first one. That is the

1 first thing. That is the first case.

2 The second thing is, they say, hey they might walk.

3 I sort of had a little bit of back and forth with Mr.

4 Young on it. Said look, you take that with a grain, I

5 said, these are the managers, they are not going to walk

6 from this thing. He told them they the same take it with

7 a grain of salt.

8 So basically what can you glean from what Citi said?

9 The deal isn't good enough, the things aren't that bad.

10 Did they follow that advice? They did not. They did a

11 deal. And six days later. Again, unlike Willard, they

12 didn't follow the advice. Whether explicit or between the

13 lines, Citi is trying to tell them, hey, here is what you

14 should do and didn't do it.

15 Now, what would they say about they didn't? We had

16 to do it. Mr. Colton believed he had a hard deadline of

17 seven years to get the deal done. Had to get liquidity.

18 That is just not so. As Ms Edwards and her colleagues

19 wrote in the brief, the seven years, if you look page

20 three of their brief, aspirational goal. Even if you are

21 assuming it was aspirational, Mr. Colton felt the need to

22 get liquidity for the A Ten shareholders, that would not

23 be an unreasonable thing. He had two years. He could

24 have told them no for six months, and if they had been

25 told no, would have come back with more money? Might

1 have, might not have. But what he did know was Citi was
2 telling them the deal wasn't good enough. And they didn't
3 do it. They just went ahead and they took a two
4 thousandth of a share increase from point 520 to point 522
5 to get this deal done.

6 The next piece of this is disclosures.

7 THE COURT: Do you have something to say about
8 disclosures that is not in your brief? I have read your
9 brief. They are excellent briefs.

10 MR. JARVIS: I would like to -- let me go over
11 overarching --

12 THE COURT: Let me what?

13 MR. JARVIS: An overarching, a big point. And I will
14 some of them, little details, I will save -- they are
15 suggesting, keep suggesting that all these disclosures are
16 at the level that would allow someone, you know, we are
17 saying you have to give enough so that every single
18 shareholder can independently value the company. That is
19 not -- the information we are seeking probably would not
20 allow that. Perhaps. But that is not what we are
21 seeking. We are, we want, what we want is shareholders to
22 know that this company -- they understand what it is, they
23 are invested, they have got a certain, they have got a
24 view to what its likely growth is. And they have a view
25 as to what its likely long-term process are. And the

1 question is, are those being taken into account?

2 So what are the things we are looking for? FFO and
3 AFO. Why? They are an important metrics that are growing
4 faster than with a metric they provided, so if you are
5 shareholder, they gave easily two, the one I really rely
6 on have higher growth rate. That is something I should
7 know. That makes me think maybe what I want to think
8 about what the Citi opinion, whatever it is.

9 We asked for cash flow information. The free cash
10 flow. Again, you know, that is where dividends come from
11 at the end of day. We will go into FFO, AFFO. But that
12 is what Citi is looking at. Why can't we see? We should
13 see, and the case law is very clear, I mean at least two
14 Delaware cases that are failure to give cash flow
15 information is sufficient to get it. Irreparable harm in
16 and of itself. That is important stuff that, you know,
17 irreparable.

18 Then we are asking for a metric of terminal growth.
19 And to me, personally, I will go over the valuations, but
20 that is the most important one, because the Citi didn't
21 use a term, what they call terminal growth or use what
22 they call use multiple method. But they provided the
23 board, hey, by the way, our multiple method, here is what
24 the growth rate that is implicit in this. And they were
25 low, negative to 1.8. Well, elsewhere the board knows,

1 and I think shareholders may have understood, this
2 industry growth pretty much averages around three percent
3 a year.

4 THE COURT: It does what at three percent?

5 MR. JARVIS: Growth.

6 THE COURT: Okay.

7 MR. JARVIS: What they call reb par growth, long term
8 growth rate. According to their own materials on reb par
9 is three percent a year. I think that is in some of
10 their -- I don't know if in the public filings or not --
11 but, you know, knowing that the Citi's valuation --

12 THE COURT: That is for up-scale hotels?

13 MR. JARVIS: Upscale, not full service. They are
14 like up-scale, but they don't offer like spas and things,
15 you know.

16 THE COURT: As opposed to like --

17 MR. JARVIS: Like there is a luxury up-scale, and
18 then up-scale with partial service.

19 THE COURT: This is aimed at this specific industry
20 and doesn't include the Motel 6's of the world.

21 MR. JARVIS: No. So, that is what is reflected in
22 their analysis. Remember, all they have got, all they
23 have got, they have got, you know, just a roll up, they
24 are getting rolled up into the thing, all they have got is
25 this opinion. Shouldn't they under -- they might well

1 care. I don't know if they are going to care or not. But
2 I think it is relevant. I believe any rational
3 reasonable, person, it is relevant for them. The Citi
4 opinion is premised on a long-term growth rate which will
5 drive the value a lot, Your Honor, let me tell you, from
6 one who has done these cases a lot, will drive it a lot.
7 Growth rate is really below long term, it is below
8 inflation, essentially a negative, high end of their
9 growth rate is negative, negative real growth, below
10 long-term inflation at around two percent. That is
11 something that shareholders ought to know. That is what
12 is driving the VCN valuation.

13 Then on the two other final deals. These are the
14 points not in the brief. Our argument to Your Honor was,
15 look, the multiples of Apple Ten, other Apple entities are
16 the best comps. And then if you don't know what the
17 individual, you know, multiples for the various companies
18 are, and you can't see how the range is derived. Then I
19 would say, think about this. If you are a shareholder and
20 you know, you are looking at this list, and you say, hey
21 here is, all these are Apple companies, just like my
22 company, and here is their multiples, the range is really
23 different from that, these are much higher. Would that
24 inform your judgment as to whether you think this
25 valuation is something that is worth keeping, or worth

1 going with, or maybe you are not getting properly changed?
2 I remind you, even with that limited information
3 20 percent of people voted against, frankly shocking
4 numbers, usually passing in the 90s, quite frankly. But
5 that is their data. Like 80 percent, I think, in favor.
6 The best they would ever get, even without knowing some of
7 the stuff I am telling Your Honor about. Probably passing
8 even if you grant disclosures. I am not going to say I
9 know the answer. If I had to bet money, I would say given
10 that, probably will, they usually do, but not always.
11 Deals get voted down. I mean there was a deal with Dole a
12 few years ago that I think came with ten percent of being
13 voted down. Similar kind of deal. So they can happen.

14 But it doesn't matter whether they vote it down. It
15 matters that when they pull the trigger to get rid of this
16 untraded thing, they at least know what the heck they are
17 doing, and why they are doing it rather than just having
18 to trust to a barely disclosed Citi opinion.

19 Now, let's go -- irreparable harm -- the briefs cover
20 it -- disclosure, I think, gets you there.

21 Really the issue turns on the balance of the
22 equities.

23 THE COURT: Turns on what?

24 MR. JARVIS: Balance of the equities, balance of the
25 harms, however you want to --

1 THE COURT: It turns on likelihood of success on the
2 merits.

3 MR. JARVIS: And the only issue there really is,
4 Mr. Knight and the board of Apple Hosp is going to walk
5 away because given the stock prices, we know
6 (unintelligible) who knows what it will be September 15,
7 the shareholders of Apple Ten go -- it might -- lets go
8 with the scenario, we will be here. Your Honor will have
9 said there is a substantial likelihood of success on the
10 merits. I am enjoining this. Do these things. Right?
11 And then, they are going to say, in light of that, Your
12 Honor, we are going to walk on this deal and throw it back
13 to the world because they are getting two percent more. I
14 think that is so unlikely as to be effectively laughable,
15 Your Honor.

16 There is no real harm here. They are going to close
17 this deal whether it is 17th of September or the 15th of
18 October.

19 On that thought, Your Honor, having spent less than
20 the hour I promised, I will sit down.

21 THE COURT: All right. Thank you very much.

22 Let me see. Let me give you back -- do you want back
23 this --

24 MR. JARVIS: Your Honor may keep it. I will save the
25 Federal Government the cost of Your Honor having to print

1 it off West Law if you want to refer to those footnotes.

2 THE COURT: Hold on one second.

3 Hold on one second, ma'am.

4 All right. Do you have anything to add that is not
5 in your brief? I don't think you do.

6 MS EDWARDS: I guess I don't.

7 THE COURT: You, Mr. Gately, don't have anything to
8 add that is not in the brief?

9 MR. GATELY: Your Honor, the only thing I --

10 THE COURT: All right. Thank you very much.

11 I am going to deny the preliminary injunction.

12 Here is the way I look at this case.

13 The problem from plaintiffs' standpoint is two-fold.

14 One is, that they have to make a clear showing of likely

15 success on the merits. I think what they have outlined

16 today is a jury issue. I think this goes to the jury. I

17 think there is a substantial likelihood they will prevail

18 at that point. But, you know, there is also a substantial

19 likelihood that they won't prevail. And when I compare

20 this to the Willard case -- and the Willard case, as

21 counsel pointed out, as Mr. Jarvis pointed out, is

22 different in that there are a bunch of people who know

23 each other, it is pretty clear, I think, if you read

24 between the lines that Mr. Willard is just trying to force

25 them to buy him out of the business because he doesn't

1 want to be in business with young Mr. Cappellari, or
2 whatever his name is, with the son of the founders of the
3 business. And, you know, everybody knew what a building
4 supply business in Bedford, Virginia was worth. But
5 nevertheless the court engages in this little bit of a
6 fictional review of the business judgment rule and makes
7 it clear that there is substantial discretion on behalf of
8 the corporation and its directors to reject a bid that
9 appears in many ways to be better than the other one. And
10 what you have got here is I think good arguments that it
11 was a reasonable exercise of the business judgment of the
12 directors. You have got the appointment of the special
13 committee, which consists of non Knight members. You have
14 got the selection of Citibank as an adviser, the selection
15 of the law firm of McGuire, Woods, Battle and Boothe to
16 handle the thing, which is I think a fair selection for a
17 company here. The exclusion of Glade Knight from the
18 process. The negotiations that went on with Apple
19 Hospitality that, you know, maybe they could have
20 negotiated harder, maybe they couldn't have. But there
21 was negotiation. It wasn't just a rubber stamp. You have
22 got the go shop after a purchaser is selected, which is,
23 you know, it is true that I suppose in some circumstances
24 a go shop that is after a deal is hatched is less likely
25 to succeed, but if the deal was way off the mark, the go

1 shop is going to raise the price some.

2 And I think, at least arguably, the timing is okay.

3 Now, the existence of the B shares as what the
4 plaintiff calls a windfall to Mr. Knight and others who
5 were involved in this transaction, it is a lot of money
6 that goes to him in this. But the other side of that coin
7 is that everybody knew about the B shares from the very,
8 very start. And everybody knew that Mr. Knight was
9 looking for a way for his sweat equity in this deal to pay
10 off. And, you know, the company did well, and he was
11 rewarded for that at the time of what they have
12 euphemistically called the liquidity event, which we might
13 also call a sale.

14 It is troublesome. And it is an incentive for them
15 to push the deal through. But I don't think it
16 necessarily poisons, I was going to say poisons the apple,
17 but that is not the right term in this case. It doesn't
18 poison the strawberry smoothie. So I think that the
19 business judgment rule precludes me from finding that
20 there is a clear showing of likelihood of success on the
21 merits.

22 Now, I think it is pretty clear that this deal is
23 going to go through. I think he is right on that,
24 Mr. Jarvis is.

25 I think it is also clear that this is going to be a

1 case that goes to the jury. And I think if the jury
2 decides against essentially the Knights in this case,
3 because I think that is what this case is going to be,
4 there are going to be some issues. I think that, you
5 know, if Mr. Justin Knight decides to stand up in front of
6 the jury and say although he is the CEO he doesn't know
7 what Apple Hospitality would do if the deal was delayed,
8 nobody is going to believe that. That is just -- maybe it
9 is true, but I think that is going to be, that there are
10 aspects of this that are a tough sale when you get to jury
11 time. So I hope that you all will consider some
12 resolution of this other than going to trial.

13 Now, let's set this case for trial. Let me say one
14 other thing. Let me compliment both sides on doing a good
15 job on a compressed schedule in this case. Not just with
16 the briefing, which was enlightening, but with the degree
17 of cooperation that occurred on what seems to me to be a
18 large amount of discovery in a relatively short time. I
19 know that you had change to change your schedules to do
20 this. You had to change your schedule, and I am sure
21 Mr. Knight and his colleagues had to go out of their way
22 to provide information and to sit for depositions. I
23 don't see that too often. So, thank you all for doing
24 that. I especially don't see it with out-of-town law
25 firms. I am really impressed that on both sides.

1 Now, let's set this case for trial.

2 How do you all look the week of September 26th?

3 2016.

4 MR. JARVIS: I didn't hear.

5 THE COURT: September 26. Next month.

6 MR. JARVIS: For trial?

7 THE COURT: Can you try the case then?

8 MS WINCHESTER: We, as Mr. Jarvis indicated during, I
9 think with Mr. Justin Knight, because we were able to, one
10 of the reasons we did not come, Your Honor, we were able
11 to compromise on the discovery in an expedited manner was
12 there is a lot more discovery, especially on the
13 Hospitality side with respect to the Wells Fargo
14 valuation, communications between --

15 THE COURT: You are saying you have more discovery to
16 do?

17 MS WINCHESTER: We have got more discovery to do,
18 Your Honor.

19 THE COURT: How much more discovery do you have to
20 do? If you have already looked at 30,000 documents it
21 seems that is a lot. But, you know, I used to try cases
22 where people shot each other, so, there wasn't a lot of
23 paper in that.

24 MS WINCHESTER: Your Honor, I can give you -- I don't
25 know how many pages it will take on our side. I can give

1 you broad categories of information that we don't have.
2 Mainly, stuff on the Hospitality side, i.e. valuation on
3 the Hospitality side, as well as communications between
4 and among Hospitality board.

5 THE COURT: Okay. I am sure that there is just an
6 Encyclopedia Britannica worth of discovery to do in this
7 case.

8 Can we try the case then in December?

9 MS WINCHESTER: I think that is doable, Your Honor.

10 MR. JARVIS: Depends on their ability to get the
11 stuff to us, obviously.

12 THE COURT: Well, they have got a whole information
13 room somewhere.

14 MS EDWARDS: We have already produced that data room,
15 Your Honor.

16 THE COURT: Well then, we are -- how about the week
17 of December 12?

18 MR. GATELY: Fine with me, Your Honor.

19 MS EDWARDS: Fine with us, Your Honor.

20 THE COURT: All right.

21 You guys are in law firms that don't have hundreds of
22 lawyers to throw at this. Can you all -- do you have your
23 calendars with you? Of course not, because we have an
24 antiquated rule that says you can't bring them in. Do you
25 know your calendars for the week of December 12?

1 MS WINCHESTER: I think I am fine, Your Honor. I
2 think we go to an Eagles Red Skins game on the eleventh,
3 but other than that --

4 MR. JARVIS: Probably by then they won't be worth
5 going to.

6 THE COURT: I will tell you, that is not true. The
7 Eagles are going to all right this year.

8 MS WINCHESTER: That is my aspiration this year.

9 THE COURT: That is an aspirational goal.

10 MR. JARVIS: If ever there was one, Your Honor.

11 THE COURT: I can't do it January. I have a big
12 patent case that may not settle.

13 MR. GATELY: Has to be better than that?

14 MS WINCHESTER: Does it make sense to confer -- I'm
15 not sure on their side when they can produce the
16 documents. Maybe it makes sense for us to sit down and
17 talk about a time frame and when they can do it, and we
18 can do it and come back to Your Honor with proposals.

19 THE COURT: All right. All right.

20 Let's do that then.

21 What do we have next week? We will have a conference
22 call next week to set this thing for trial.

23 MS WINCHESTER: That makes sense, Your Honor.

24 That --

25 THE COURT: That will give you a little chance to

1 chat with your clients. This is Friday, right? How about
2 if we do it the 31st at 9:00 o'clock in the morning?

3 MS WINCHESTER: That works for us. Telephonically?

4 THE COURT: Yes. Do it on the telephone.

5 MS WINCHESTER: That works for us.

6 THE COURT: Is that all right, Mr. Gately?

7 MR. GATELY: All right with me, Your Honor.

8 THE COURT: Ms Edwards?

9 MS EDWARDS: Yes, Your Honor.

10 THE COURT: We will have a conference call on
11 August 31, and between now and then I would like you to
12 confer about the discovery, and if you can come up with a
13 schedule, see if you can work into that schedule a
14 slightly shorter response time on answers to
15 interrogatories and production and so forth.

16 Okay?

17 MS WINCHESTER: Yes.

18 THE COURT: Maybe 20 days. But you know, you all
19 know what is involved in this case better than I do.
20 Although, that is probably glaringly obvious.

21 All right. Anything else?

22 MS WINCHESTER: Could I raise one other issue that I
23 said we could do deal, with timing?

24 THE COURT: Oh, yes. Yes.

25 MS WINCHESTER: So I would propose, I know that we

1 discussed maybe 30 days from today. This way we don't
2 burden The Court with memorandum and stuff, and this way
3 we can discuss among ourselves which should be redacted,
4 which shouldn't, and if I could wrap into that yesterday
5 when defendants filed their reply to the motions to
6 dismiss they had to seal it because it attaches
7 Mr. Quinn's deposition, which does contain some of his
8 personal information, investment information. I would ask
9 that we could also wrap that into the sealing schedule and
10 deal with the sealing documents that have been filed in
11 this action at one time.

12 THE COURT: All right.

13 MS WINCHESTER: And do so in 30 days.

14 MS EDWARDS: That seems reasonable.

15 THE COURT: That is a high ceiling in this case, but
16 we will do it.

17 MR. GATELY: Your Honor, I don't know if you intend
18 to have a separate hearing on the motion to dismiss or
19 just rule on the papers.

20 THE COURT: Well, I have got to say I haven't read
21 all the papers on that. And we haven't -- we meaning
22 him -- haven't done all the research on it. But, if I
23 need a hearing on it I will let you know.

24 MR. GATELY: We can talk about that on the call.
25 Thank you very much, you and your staff, Your Honor.

1 THE COURT: You are welcome. That is what we are
2 here for.

3 Anything else?

4 MS WINCHESTER: Your Honor, that is all.

5 THE COURT: All right.

6 How about you, Mr. Jarvis, anything more?

7 MR. JARVIS: I am good, Your Honor.

8 THE COURT: How about you three guys over here? Do
9 you have anything to add?

10 MR. BUCKLEY: Nothing, Your Honor.

11 THE COURT: Mr. Williams, are input is always welcome
12 on anything.

13 MR. GATELY: Your Honor, I have a five-second delay
14 here between what goes in here and what comes out of my
15 mouth.

16 MR. JARVIS: Only five?

17 MR. GATELY: If you don't hear me say anything, you
18 know it worked.

19 THE COURT: Okay. Thank you all very much.

20 MS WINCHESTER: Thank you, your Honor.

21 THE COURT: Mr. Williams, I want to thank you for
22 that work you did as guardian in that case. I appreciate
23 that.

24 MR. GATELY: Yes, sir.

25 THE COURT: Adjourn court.

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HEARING ADJOURNED.

THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

GILBERT FRANK HALASZ, RMR
OFFICIAL COURT REPORTER